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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 956

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

HARNISCHFEGER CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1945
CERTIORARI GRANTED APRIL 2, 1945

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1 *Placita*

In The District Court of the United States

For the Eastern District of Wisconsin

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the District Court of the United States of America, for the Eastern District of Wisconsin, begun and held at the City of Milwaukee, in said District, on the first Monday (being the 3rd day) of January A. D. 1944;

Present the Honorable F. Ryan Duffy, Judge of said Court, presiding:

Among other the following proceedings were had, to wit:

Civil Action No. 1087

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

vs.

HARNISCHFEGER CORPORATION, A CORPORATION, DEFENDANT

Be it remembered that heretofore, to wit: on the 26th day of April A. D. 1943, came the plaintiff and filed his bill of complaint against the defendant as follows:

2 In the District Court of the United States

For the Eastern District of Wisconsin

Civil Action, File No. — Equitable Relief Sought

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

vs.

HARNISCHFEGER CORPORATION, A CORPORATION, DEFENDANT

Complaint

I

Plaintiff brings this action to enjoin defendant from violating the provisions of sec. 15 (a) (1) and 15 (a) (2) of the Fair Labor Standards Act of 1938 (act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201, et seq.), hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the Court by sec. 17 of the Act.

III

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the state of Wisconsin, having its principal office, place of business and a certain manufacturing plant in the City of Milwaukee, Milwaukee County, Wisconsin, within the jurisdiction of this Court, and is, and all times hereinafter mentioned was, engaged at its said place of business in the City of Milwaukee, Milwaukee County, Wisconsin, in the manufacture, production, sale and distribution of electric cranes, hoists, motors, welders, power excavating machinery, welding electrodes, housing panels, and other heavy metal products.

3

IV

At all times hereinafter mentioned, defendant has employed and is employing approximately four thousand (4,000) employees in and about its plant in the City of Milwaukee, Milwaukee County, Wisconsin, in the production of the said metal products hereinabove described, and in processes and occupations necessary thereto. Substantial quantities of the goods produced by the said employees in said plant have been and are being produced for interstate commerce, and have been and are being sold, transported, shipped and delivered in interstate commerce from the said plant in the State of Wisconsin to, into and through states other than the State of Wisconsin.

V

The defendant has employed certain of its said employees, who were engaged in interstate commerce or in the production of goods for interstate commerce, as aforesaid, for workweeks longer than forty-four (44) hours from October 24, 1938 to October 24, 1939, for workweeks longer than forty-two (42) hours from October 24, 1939 to October 24, 1940, and for workweeks longer than forty (40) hours since October 24, 1940, without compensating each of such employees for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he was employed. By employing the said employees for workweeks in excess of the said hours during the said periods, without compensating them for their employment in excess of

the said hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed, the defendant has violated and is violating the provisions of Sections 7 and 15 (a) (2) of said Act.

VI

During the period beginning on or about October 24, 1938, and continuously to the date hereof, defendant has sold, shipped, delivered, transported and offered for transportation in interstate commerce goods produced in the aforesaid place of
4 business in the production of which certain of its employees were employed in violation of Section 7 of the Act, as alleged in par. V hereof. By selling, shipping, delivering, transporting, and offering for transportation in interstate commerce, as aforesaid, the said goods so produced, defendant has violated and is violating the provisions of Section 15 (a) (1) of the Act.

VII

During the period beginning on or about October 24, 1938, and continuously to the date hereof, defendant has shipped, delivered and sold, with knowledge that shipment, delivery and sale thereof in interstate commerce was intended, goods produced in the aforesaid place of business, in the production of which certain of its employees were employed in violation of Section 7 of the Act, as alleged in par. V hereof. By selling, shipping, and delivering, with knowledge that shipment, delivery, and sale thereof in interstate commerce, as aforesaid, was intended, the said goods so produced, defendant has violated and is violating the provisions of sec. 15 (a) (1) of the Act.

VIII

The goods produced by defendant in and from the aforesaid place of business compete with similar goods produced and distributed in other states, and defendant in its said business competes with producers and distributors of similar goods located in other states. The employment of workers for workweeks in excess of the number of hours specified in sec. 7 of the Act without compensating them for such excess hours at rates not less than one and one-half times the regular rates at which they are employed, as alleged in par. V hereof, has enabled and does enable defendant to secure an unfair competitive advantage over firms producing and distributing similar goods in other states, and has enabled and does enable defendant to undersell many competitors

in other states who maintain labor standards, in accordance with said Act, and to divert business from them.

5 IX

Defendant has, since the effective date thereof, continuously violated the aforesaid provisions of the Act, and threatens and intends to continue to violate the said provisions unless enjoined and restrained by a judgment of this Court.

X

A judgment enjoining and restraining the violations hereinabove alleged, is specifically authorized by sec. 17 of the Act.

Wherefore, plaintiff demands judgment enjoining and restraining defendant, its officers, agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of sec. 15 (a) (1) and 15 (a) (2) of the Act, both permanently and during the pendency of this action, and such other and further relief as may be necessary and appropriate.

IRVING J. LEVY,
Acting Solicitor,
FRANK J. DELANY,
Acting Regional Attorney,
VICTOR M. HARDING, JR.,
Attorney,
Attorneys for Plaintiff,
United States Department of Labor, Wage and Hour Division, Room 1200, Merchandise Mart, 222 W. North Bank Drive, Chicago, Illinois.

[Endorsed: "Filed Apr. 26, 1943. B. H. Westfahl, Clerk."]

6 In the District Court of the United States

[Caption—1087]

(Filed May 12, 1943)

Answer

Now comes the above-named defendant, by its attorneys, Lines, Spooner & Quarles, and for answer to the plaintiff's complaint, denies and alleges, as follows:

(1) Answering paragraph V of the complaint, defendant denies that any of its employes have been employed for work weeks

longer than those specified in the Fair Labor Standards Act of 1938, hereinafter called the "Act," without being compensated for their employment in excess of the workweek hours specified in the Act, at a rate of not less than one and one-half times the regular rate at which they were employed, and further denies that the defendant has violated or is violating the provisions of Sections 7 or 15 (a) (2) of said Act.

(2) Answering paragraph VI of the complaint, defendant denies that any of its employes were employed in violation of Section 7 of the Act, and denies that defendant has violated or is violating the provisions of Section 15 (a) (1) of the Act.

(3) Answering paragraph VII of the complaint, defendant denies that any employes were employed by the defendant in violation of Section 7 of the Act and denies that defendant has violated or is violating the provisions of Section 15 (a) (1) of the Act.

(4) Answering paragraph VIII of the complaint, defendant denies that it has employed, or is employing workers in violation of the Act and denies that its employment policy has enabled or does enable the defendant to secure any unfair competitive advantage over other firms producing and distributing in other states goods similar to those produced and distributed by the defendant, or that said employment policy has enabled, or does enable, defendant to undersell any competitors in other states who maintains labor standards in accordance with said Act, or to divert business from them. Defendant alleges that at all times since the effective date of the Act, it has complied with and maintained labor standards in accordance with said Act.

(5) Answering paragraph IX of the complaint, defendant denies that it has at any time violated any of the pro-
7 visions of the Act, or that it threatens or intends to violate any of the provisions of said Act.

Wherefore, defendant demands judgment dismissing plaintiff's complaint.

LEO MANN,
Leo Mann,
CHAS. B. QUARLES,
C. B. Quarles,
MAXWELL H. HERRIOTT,
Maxwell H. Herriott, [L.M.]
Attorneys for Defendant.

T. W. KORB,
LINES, SPOONER & QUARLES,
Of Counsel,
411 East Mason Street, Milwaukee, Wisconsin.

STATE OF WISCONSIN,
Milwaukee County, ss:

H. S. Strouse, being first duly sworn, on oath, deposes and says that the above named defendant is a corporation; that he is an officer thereof, to wit: the Vice President thereof, and makes this verification on behalf of said defendant, being duly authorized so to do; that he has read the foregoing Answer and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein stated on information and belief, and as to matters as to which defendant is without knowledge, and as to those matters he believes it to be true.

H. S. STROUSE.

Subscribed and sworn to before me this 6th day of May 1943.

GENEVIEVE WILLIAMS,
Notary Public, Milwaukee Co., Wis.

My commission expires March 9, 1947.

[Endorsed: "Filed May 12, 1943. B. H. Westfahl, Clerk."]

In the District Court of the United States

[Caption—1087]

Motion to dismiss

Now comes Maxwell H. Herriott, one of the attorneys for the above named defendant, and moves this Court, pursuant to Rule 12 (d) of the Rules of Civil Procedure, for a preliminary hearing and determination as to whether defendant is not entitled to an order for judgment dismissing the plaintiff's complaint because of the contract attached hereto, pursuant to which defendant employs the approximately 4,000 employes mentioned in the plaintiff's complaint, which discloses on its face that said employment is not in violation of the Fair Labor Standards Act of 1938, or of any other Federal or State Statute, and establishes that plaintiff's complaint sets forth no claim upon which the relief prayed for can be granted.

Respectfully submitted.

MAXWELL H. HERRIOTT,
One of the attorneys for Defendant
Harnischfeger Corporation.

AUGUST 19, 1943.

[Endorsed: "Filed Sept. 16, 1943. B. H. Westfahl, Clerk."]

In the District Court of the United States

[Caption—1087]

Order denying motion to dismiss

September 16, A. D. 1943

Before Hon. F. RYAN DUFFY, Judge

This day came the parties by their counsel and a motion of defendant to dismiss the complaint pursuant to Rule 12 of Rules of Civil Procedure having been heretofore submitted at the pretrial conference, on consideration thereof.

It is Ordered that said motion be and the same hereby is denied.

9 Thereupon the issues herein came on to be tried upon a stipulation of facts in writing; was argued and submitted when the court took the same under consideration.

Witnesses sworn: Herman Menk.

Appearances: Victor M. Harding, Joseph D. Donahue, Frank J. Delany, Plaintiff. Lines, Spooner & Quarles by Max H. Herriott, Leo Mann, Defendant.

[Endorsed: "Filed Sept. 16, 1943. B. H. Westfahl, Clerk."]

In the District Court of the United States

[Caption—1087]

(Filed Sept. 16, 1943)

Stipulation of facts and exhibit attached

It is stipulated by and between the attorneys for the parties to the above entitled cause, as follows:

1. Attached hereto, marked Exhibit A, is a true and correct copy of the contract entered into between the defendant and the Union, constituting the exclusive bargaining agency for all production employees of the defendant, dated December 9, 1942, and expiring by its terms November 30, 1943. For the purposes of this case, it is agreed that the Court may consider the attached contract to have been in effect since October 24, 1938. Substantially the same system of compensating its production employees has been in effect at the defendant's plant since 1927. Wherever such contract terms as "incentive workers," "base rate," "production employees," "piece rate," and "average hourly earnings"

are used in this Stipulation, they should be considered as having the meaning or definition given them in the attached contract.

2. The defendant employs approximately 2,615 production employees in and about its plant in Milwaukee, Wisconsin, of whom 1,239 are classified under the said contract as incentive workers.

3. The total compensation paid by the defendant to its incentive workers on a biweekly pay roll, based on the month of May 1943, which is taken to be representative, is approximately $207,949.89, of which amount approximately $149,991.47 consists of base pay, $14,743.56 represents overtime premium, and $43,214.86 represents incentive, or piece rate earnings over and above the pay at base rates.

4. In each pay roll, approximately 98½% of all incentive workers receive incentive, or piece rate earnings, in some amount, while approximately 1½% receive nothing but their base rate of pay, plus any overtime computed in the manner provided in Section 4 (a) of the attached contract.

5. Under the attached contract, the defendant, for purposes of vacation pay, computes the average hourly earnings of each incentive worker by dividing each worker's total base pay (including Defense Wage Adjustment) plus incentive, or piece rate earnings, received, by the total number of hours worked in the pay period. No overtime premium received by the worker is included in the computation of such average hourly earnings. The following is a representative list of incentive workers, with the present respective base rate and average hourly earnings set forth after each man's name:

Name	Base rate	Average hourly earnings
William Everet	$0.80	$0.92
Gerald Propp	.75	.87
Robert Fritzche	.75	.80
Paul Breister	.97	1.26
Gerry Hottenroth	.72	.87
Thomas Kaczmarek	.86	1.12
George Neman	.86	1.09
Herbert Springlair	.86	1.04
Gustave Henschel	.86	1.03
Gilbert Baumen	.83	1.00
John Tucholka	.70	.83
William Slattery	.80	.88
William Empsorn	.84	.93
Anton Kavalar	.90	.96
David Carpenter	.60	.74
Arne Klauser	.50	.61
Garnett Roddy	.50	.57
Eunice Holtstander	.50	.57
Genevive Ross	.50	.52
John Gettinger	.70	.77
Alex Stawicki	.65	.73
John Britton	.90	1.02
Robert Meddaugh	.95	1.12
McCoy Heding	.97	1.10
Louis Baier	.70	.77
Delmar Peters	.95	1.06
Cecilia Vigo	.65	.75

Name	Base rate	Average hourly earnings
Vincent Ragen	$0.80	$0.97
Earl Mareller	.60	.63
Leo J. Brezezinski	1.00	1.07
Joseph Rehbein	.80	.96
Richard Bonjkowski	.75	.84
Edmund Wazalla	.65	.81
Norman F. Becker	.75	.85
Earl Bucholtz	.60	.74
Herman F. Scholbe	.97	1.17
Hugo Schemeckele	.97	1.17
Telfield Ahonen	.85	1.03
Owen Nethercott	.85	.98
Casmir Nowak	.75	.81
Richard Moriarity	.70	.81
Alvin Lambrecht	.75	.81
Ludwig Lalpa	.70	.78
John Hruska	.97	1.11
Raymond Brantz	.70	.84
Frank Beguhn	.75	.85
Leonard Pedak	.90	1.09
Louis Tatalovich	.78	.96
Frederick Arndt	.78	.82
Frank Robbins	.65	.74

Note: The Defense Wage Adjustment of 5¢ per hour must be added to each figure in both columns.

6. During the period since October 24, 1938, the defendant has never paid any incentive worker, for hours worked in excess of 40 per week, at more than one and one-half time his base
12 rate of pay, except where the contract calls for a greater percentage of his base rate. The incentive worker's piece rate earnings, over and above his base rate, have never been included with the base rate of pay in computing overtime compensation for incentive workers.

Dated September 16, 1943.

(Signed) DOUGLAS B. MAGGS,
Solicitor,
KENNETH P. MONTGOMERY,
Regional Attorney,
FRANK J. DELANEY,
Senior Attorney,
VICTOR M. HARDING, JR.
Attorney,
Attorneys for Plaintiff United States Department of Labor, Wage & Hour Division.

LEO [illegible]NN,
MAXWELL H. HERRIOTT,
Attorneys for Defendant.

AGREEMENT

Agreement, made this 9th day of December 1942, between Harnischfeger Corporation, hereinafter called the "Company," first party, and United Steel Workers of America, Local Union 1114 (C. I. O.), and the successors of said Union, hereinafter called the "Union," second party.

SECTION 1. It is the intent and purpose of the parties hereto that this agreement will improve and promote industrial and economic relationships between the Company and the Union.

SECTION 2. Recognition.

(a) It is agreed that the Company's production employees, as hereinafter defined, constitute a separate appropriate bargaining unit, and the Company hereby recognizes the Union as the exclusive bargaining agency for all the production employees in said bargaining unit, and this agreement covers all said employees.

The term "production employees" shall include all shop employees of the Company's Main Plant and employees performing main plant operations at the West Allis Plant, except
13 superintendents, assistant superintendents, foremen, watchmen, rate setters, engineers and draftsmen, and powerhouse employees, and any office or other salaried employees.

(b) The Company hereby recognizes the Union as a collective bargaining agency for those office and clerical workers and engineers and draftsmen who are members of said Union.

(c) The Company recognizes and will not interfere with the rights of its employees to become members of the Union. There shall be no discrimination, interference, restraint, or coercion by the Company or any of its agents against any employee because of membership in the union.

(d) The Union and its members recognize and agree not to interfere with the rights of any employees who do not wish to become members of the Union, and agree that there shall be no intimidation or coercion used by anyone to cause employees to join the Union and that there shall be no solicitation for membership in any Union on Company time, and no transacting of other Union business on Company property, except that the occasional collection of Union dues for the personal convenience of individual members shall not be a violation of this paragraph.

(e) There shall be no partiality in the distribution of work and overtime.

SECTION 3. Wages.

(a) The Company agrees to make every reasonable effort to provide steady employment and afford employees maximum annual earnings and to follow a policy of sharing with employees

any future prosperity by granting fair wage increases whenever operating results and conditions permit, and to make individual adjustments to remove any inequalities that may exist.

(b) Minimum and Hiring Rates—To conform to minimum and hiring rates which have been in effect since June 1942, the following rates are in effect: For male employees the minimum hourly rate shall be Sixty Cents (60¢) and for female employees the minimum hourly rate shall be Fifty Cents (50¢).

(c) Wage Rates—The hourly rates for nonincentive workers and the base rates and piece rates for incentive workers as established in the 1940–41 agreement and currently in force shall remain in effect and be the basis for computation of regular earnings, for the life of this agreement, subject to the Defense Wage Adjustment hereinafter provided.

(d) Wage Adjustment—To conform to the practice which has been in force since August 15, 1942, a "Defense Wage Adjustment" will be made to all eligible employees, as follows: Nonincentive workers whose hourly rate of pay is Seventy Cents (70¢) or less shall receive an adjustment payment of Seven Cents (7¢) per hour; nonincentive workers whose hourly rate of pay is in excess of Seventy Cents (70¢); and all incentive workers regardless of the amount of their base rate, shall receive an adjustment payment of Five Cents (5¢) per hour. These adjustments shall be made to male and female employees alike. Daily and weekly overtime (but not both) shall be allowed in computing this adjustment. The adjustment payment shall be made each pay day and be included in the regular pay check, but the amount thereof shall be separately shown on the pay check stub.

(e) As agreed to between the Company and the Union in the last two annual collective bargaining sessions, the parties agree that, for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed, is the base rate of each such employee. It is the intention of the Company and the Union that the base rates and piece work rates fixed by this agreement shall remain in effect, and that there shall be no general reductions therefrom during the life of this agreement. However, the Union and the Company recognize that, should adverse economic conditions arise, it may be desirable and necessary, in the interest of employees' security of employment and earnings and the Company's future welfare, to modify the rates hereby established before or at the expiration of this agreement, and it is, therefore, agreed that, should the Company in good faith request such a modification of rates during the life of this agreement, the Union will in good faith enter into collective bargaining negotiations on that request. In consideration

thereof the Company agrees that it will not seek such a modification unless the total shop productive hours fall below One Hundred Thirty Thousand (130,000) per month for Three (3) successive months.

(f) Cranemen who regularly operate in the Foundry and over welders in Departments CWL, PWL, D, and R, shall receive Five Cents (5¢) per hour over the regular craneman's wage.

(g) Piece work rates hereafter will be adjusted or time studied wherever possible to the end that any inequalities arising from mistakes, changed conditions of the job, changed designs, or similar reasons, be removed and corrected, and that a proportionate relation be established between rates set for operations and parts that are substantially similar.

In the interest of maintaining fair piece work rates and encouraging employees to disclose erroneous piece work rates, the Company agrees that, except for changes justified under the foregoing paragraph, it will not cut any rate established and based on its standard earning rate for the operation involved, or question the correctness of such rate, even though the employee is able to turn in as much as twenty (20%) per cent over the standard earning rate. The Company, however, reserves the right to question rates where earnings exceed twenty (20%) per cent over standard earning rates.

(h) On any job that should normally be done on piece work and where the piece rate has not been established and cannot be estimated, the job shall be done on day work, for which the piece worker shall receive a premium of not less than twenty (20%) per cent over his hourly base rate.

(i) Where a piece worker is requested to do day work, he shall receive a premium of not less than twenty (20%) per cent over his hourly base rate. This shall not apply in cases where an employee is engaged in repairing his own machine.

(j) When a piece worker is required to work on single piece or small order jobs under conditions beyond his control which make it impossible for him to earn his average high earning rate, an adjustment will be made to yield such rate.

(k) On group operations where two or more men work on the same piece work jobs, the lead card shall be made available at the completion of the job to the employees so they may note the piece work earnings made by them.

(l) All adjusted piece work cards must be returned to the employee for the purpose of personal records.

(m) In cases where an employee is unable to make his usual earnings on a piece work rate that has been established from a time study, and it is, therefore, claimed that such rate is improper,

and also where inequities in base rates are claimed, recourse may be had to the first three steps of the grievance procedure.

16 (n) Any willful misuse or abuse of day work or rates set in accordance with the foregoing shall give the Works Manager or the General Superintendent of the Company, but not foremen, the right to cancel the premium allowed. Such cancellation, if claimed to be unfair, may be taken up as a grievance if promptly presented.

(o) Shop pay days for hourly employees shall be on a semi-monthly basis, with pay days falling on the tenth (10th) and twenty-fifth (25th) of each month, or on the last working day immediately preceding such dates should they fall on a holiday or nonworking day.

(p) The Company and the Union agree to cooperate for the purpose of obtaining approval from the War Labor Board for increases in rates of employees in the classifications and amounts set forth in Exhibit A hereto attached and made a part hereof. Any change in rates to said classifications of employees which may be approved by the War Labor Board shall be effective as of December 1, 1942.

(q) The parties agree that whenever a female employee is placed upon a job formerly performed by a male worker, that the principle of equal pay for comparable work on such jobs shall apply. Any dispute arising as to the question of comparable work shall be subject to consideration under the established grievance procedure.

SECTION 4. Working Hours.

(a) The Company will operate all shop departments on a basic eight (8) hour day and forty (40) hour week with time and one-half, computed for incentive workers on their base rate as heretofore defined in Section 3, paragraph (e) and for nonincentive workers on their regular hourly rate, to be paid for overtime in excess of eight (8) hours in any one day, or in excess of forty (40) in any one week. No employee shall receive both daily and weekly overtime for the same hours so worked.

(b) Time and one-half shall be paid for all Saturday work, except when the Saturday work is done to make up for time lost during the week for personal reasons. This shall not apply to a regular shift which starts on Friday and ends after Friday midnight.

(c) Overtime at the rate of double time will be paid for all regular production work in the shop on Sundays and the legal holidays hereinafter specified, except in the case of em-

17 ployees whose regular duties embrace Sunday and holiday work, and the custodial employees. This also shall not apply to a regular shift which starts on the day immediately pre-

ceding a holiday and ends after midnight. The legal holidays referred to herein are New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day.

(d) Employees shall receive a bonus of Five (5¢) cents per hour for each hour of work on the second shift, and Eight (8¢) cents each per hour for each hour of work on the third shift, to be added to total earnings computed on the regular method.

(e) The Company agrees that employees shall not be required to produce articles not part of the Company's regular business where such work is offered by firms involved in a strike.

(f) A minimum of four (4) hours' work shall be supplied, or four (4) hours' day rate pay shall be paid, to employees reporting for work unless such employees are notified not to report during the previous day.

(g) During the emergency, the foregoing shall be subject to the provisions of any Presidential orders regulating overtime, which shall be applied so long as said orders remain effective.

SECTION 5. Seniority.

(a) In all cases of promotion from within the ranks, or decrease of forces, or recall to work after lay-off, the Company agrees to recognize and apply the principle of seniority on a departmental basis, to be applied in every reasonable way with due regard to the factors of individual skill, ability, and family status, and where all of the above factors are relatively equal, length of continuous service will govern. The Company will notify the Union in all cases of lay-off where skill or ability or family status is the governing factor. However the Company shall have the right to hire and to retain, or to call back to work after lay-offs, without regard to their seniority rating, not more than ten (10%) per cent of the regular number of employees (before lay-offs begin) in any one department, but it is understood and agreed that the total number of such exceptional employees within this paragraph shall not exceed seventy (70) employees.

(b) New employees shall be probationary employees without any seniority rights, until they have had three (3)
18 months' continuous employment, after which their seniority shall date from the date on which their last continuous employment started.

(c) Where it is practical to do so, employees qualified to do the work will be temporarily transferred to other departments before being laid off. An employee having been transferred to another departmen where others have seniority above him, before being laid off shall be given a chance to transfer to his old department where his plant seniority shall prevail if the work in such departments makes such retransfer practical.

(d) When a department is abolished or discontinued, the employees' seniority rights when transferred to other departments shall be determined by mutual agreement between the management and the Grievance Committee.

(e) All employees having one year or less seniority rights shall be laid off before the regular forty (40) hours per week are reduced. In departments when there is sufficient equipment to make the same practical, the working hours during slack periods shall then be reduced to thirty-five (35) hours per week before further lay-offs take place.

(f) An employee shall cease to have seniority if he quits, is discharged, has been off the Company's pay roll for eighteen (18) months or more continuously (except due to serious sickness) or, after having been laid off, does not return to work or make satisfactory arrangements with the Employment Office within three (3) working days after receiving notice. Seniority records will be maintained and available in the Employment Department for inspection by any employee and the Union Grievance Committee at reasonable times.

(g) All officers of the Union, namely, President, Vice President, Financial Secretary, Recording Secretary, Treasurer, Guide, Inner Guard and Outer Guard, as well as Bargaining and Grievance Committee members, and stewards not to exceed forty (40), shall have preferred seniority status.

(h) If an employee is laid off he will not be recalled to work during his unemployment benefits waiting period unless it is reasonably expected that his earnings for the week of such recall shall equal or exceed his weekly unemployment benefit rate, or that such recall contemplates steady employment.

19 SECTION 6. Adjustment of Specified Grievances.

(a) This agreement provides a method for orderly adjustment of grievances. Therefore, it is agreed that there shall be no lock-out or no strike of any kind. Any one or more employees participating in any such strike are subject to immediate discharge.

(b) The parties agree that every reasonable effort shall be made in good faith to endeavor to settle grievances promptly and in a friendly or cooperative spirit. Such negotiations may be held by the employees individually, with their foreman, or Works Manager, or through the following regular grievance procedure:

First, between the aggrieved employee and the foreman of the Department involved;

Second, between the Grievance Committee of the Union and the Works Manager, or other management official;

Third, between the Grievance Committee, who shall be accompanied by the National Representative of the Union, and the representatives of the Company designated for such purpose:

Fourth, in event the grievance shall not have been satisfactorily settled, the matter then shall be appealed to an impartial umpire to be appointed by mutual appointment of the parties hereto and in the event in fifteen (15) days no agreement on the umpire can be reached, the National War Labor Board or Dr. John R. Steelman, Commissioner of Conciliation of the United States Department of Labor shall appoint the umpire. The decision of such umpire shall be final. The expense and compensation incident to the services of the umpire shall be paid jointly by the Company and the Union.

(c) A specified time shall be agreed upon between the Union Grievance Committee and the Works Manager of the Company for the presentation of grievances hereunder which shall be not oftener than twice a month, except that lay-offs and transfers may be taken up immediately and that matters pertaining to discharges may be presented as hereinafter provided.

(d) The Union Grievance Committee shall consist of not less than (4) nor more than seven (7) employees who have had at least two (2) years of continuous employment with the Company, who shall be designated by the Union and who will be afforded such time off as may be required,

First, to attend regularly scheduled meetings;

Second, to attend meetings pertaining to discharges;

Third, to visit departments other than his own at all reasonable times during his regularly working hours for the purpose of transacting the legitimate business of the Grievance Committee, after notice to and permission from his foreman or such other supervisory employees designated by the Works Manager. Upon entering another department for any such purpose, he shall advise the foreman of that department why he is there.

(e) The Union shall furnish the Company an up-to-date list of its officers, committee men, stewards, and assistant stewards, and keep said list up to date.

(f) (1) A Grievance coming within the terms of this agreement shall be:

(1a) Any difference arising between the Company and the Union, or any of the employees, as to the meaning and application of this agreement;

(1b) Any controversy as to any matter relating to working conditions in the plant not specifically covered by this agreement.

(1c) The term "grievance" shall not include any difference or controversy relating to any matters specifically covered by this

agreement, except that the claim that any of the terms of this agreement have been violated by either party shall constitute a grievance.

(1d) The day rates, base rates, and piece work rates agreed upon in this contract (except cases arising under Section 3, Paragraph J), shall not be a grievance coming within the terms of this agreement.

SECTON 7. Discharge Cases.

In the event any employee is discharged from and after the date hereof, and he believes he has been unjustly dealt with, such discharge shall constitute a case arising under the method of adjusting grievances herein provided, but this shall not prevent the Company from placing the discharge in effect and discontinuing the services of such employee pending settlement of the matter as herein provided. A complaint of a discharged employee that he has been unjustly dealt with must be submitted in writing by him to the Company within three (3) working days from the time of discharge, otherwise such discharge shall be final and the employee shall have no recourse. In the event it should be decided under the rules of this agreement that an injus-
21 tice has been dealt the employee with regard to the discharge, the Company shall reinstate such employee and pay full compensation at the employee's regular base rate for the time lost. All such cases of discharge shall be taken up and disposed of within five (5) working days from the date of discharge.

SECTION 8. The management of the plant and the direction of the working forces and of the affairs of the Company, including the right to hire, discipline, or discharge for proper cause, or to transfer from one job to another, and the right to lay off because of lack of work or for other legitimate reasons, is vested exclusively in the Company.

SECTION 9. The Union shall not request the Company to involve itself in any way in the collection of any Union dues, fines, or assessment or in enforcing rules or regulations of any labor organization, and the Company will not in any way take action against or discipline any employees because of membership in the Union.

SECTION 10. It is agreed that every employee shall work peacefully and cooperatively with every other employee and no employee shall take any action against any other employee by refusing to work with him, by subjecting him to verbal abuse, by handicapping him in his work, or by discriminating against him in connection with his work, and any such acts contrary to the provisions or spirit of this section by any employees shall be proper cause for discipline or discharge by the Company of any one or more of such employees partcipating therein.

SECTION 11. The Company agrees to earnestly endeavor to promote the safety and health of its workers in every way and to maintain adequate facilities for treatment of accidents and to do everything possible to promote the safety and health of its employees.

SECTION 12. The bulletin boards shall be available for posting of all legitimate Union notices.

SECTION 13. For the calendar year 1943, subject to prior approval by the National War Labor Board, the Company agrees to the following vacation plan for eligible production employees covered by this agreement.

(a) All hourly employees who, on June 1, 1943, have been in the Company's service for one year, but not more
22 than six years, shall be entitled to a vacation of one calendar week, for which they shall receive vacation pay of forty-four hours.

(b) All hourly employees who, on June 1, 1943, have been in the Company's services more than six years and less than eleven years, shall be entitled to a vacation of one calendar week, for which they shall receive vacation pay of fifty-two hours.

(c) All hourly employees who, on June 1, 1943, have been in the Company's services for eleven years shall be entitled to a vacation of nine calendar days, for which they shall receive vacation pay of sixty hours, and all hourly employees who, on June 1, 1943, have been in the Company's services for more than eleven years shall be entitled to receive one additional calendar day of vacation with eight hours additional pay for each five years of service in excess of said eleven years, with a maximum of two calendar weeks and a maximum vacation pay of eighty-eight hours.

(d) Vacation pay shall be based on the employees' average hourly earnings (exclusive of overtime compensation) from January 1, 1943, to March 31, 1943.

(e) Vacations may be taken in the period between April 1, 1943, and November 30, 1943.

(f) It is the policy of both parties that employees entitled to a vacation shall take the vacations; provided, however, that if, in view of emergency conditions, the government requests or orders employees otherwise entitled to vacations to work, it is agreed that such employees shall relinquish their vacations, and in such event, the Company will pay the amounts of vacation pay to which they are entitled in lieu of vacations.

SECTION 14.

(a) From and after December 1, 1942, each employee who is drafted and each employee who is classified by his Draft Board in Class 1A, and who while so classified, enlists in the armed

forces of the United States, will be considered as being on leave of absence during the period of such service and forty days thereafter, and his length of service credit shall accumulate during such leave of absence. This shall apply only to employees who have been in our employ for one year or longer at the time of his entering the military service.

23 (b). As to employees who were drafted, or who voluntarily enlisted for military service for a one-year period, prior to December 1, 1942, the terms of the agreement between the parties, dated November 26, 1941, shall remain in full force and effect.

(c) Upon the expiration of such leave of absence each employee will be restored to his former position or to a position of like seniority status and pay, provided (1) the Company's circumstances have not so changed as to make it impossible or unreasonable to supply such employment; (2) the employee furnishes a certificate of satisfactory completion of such military service; (3) the employee can perform the duties of such position; and (4) the employee makes application for work within forty days after termination of such military service.

(d) The foregoing policies are subject to change in accordance with new legislation. In any event, the Company will strictly comply with the provisions of (1) the Selective Service and Training Act of 1940, or (2) Joint Resolution No. 96, covering Reservists, Members of the National Guard, and Retired Personnel of the Regular Army, and with any other further legislation bearing on this point.

This agreement shall remain in full force and effect until November 30, 1943.

HARNISCHFEGER CORPORATION,
By WALTER HARNISCHFEGER,
President,
HERMAN MENCK,
Works Manager,
United Steelworkers of America, Local Union 1114 (C. I. O.) (on behalf of said local Union and its individual members),
By JOHN D. GIACOMO, *Pres.*
ARTHUR J. DIEL, *Vice Pres.*,
PAUL J. RADISH, *Secy.*

24 EXHIBIT A

	Percent
1. Shear Hands	7½
2. Trolley Assemblers	10
3. Bridge Assemblers	10
4. Large Exc. Assemblers	10
5. Attachment Assemblers	10
6. Auto. Screw Mach. Set-Up	10
7. Set-Up Girders	10
8. Machinery Lay-out	10
9. Welding Inspectors	7½
10. Power Hack Saws	10
11. Heat Treaters & Helpers	7½
12. Brake Operators—Bridge Shop	7½
13. Machine Shop Inspectors	12½
14. All Other Inspectors	12½
15. Foundry—Except C. P	10
16. Tool Crib Attendants	10
17. Carpenters	12½
18. Crane Operators	10
19. Loading Gang	7½
20. Charwomen & Janitors	7½
21. Garage Help	7½
22. Outside Truck Drivers	7½
23. Experimental Workers	7½
24. Chasers	7½
25. Motor Testers	10
26. Bench Hands—Tin Shop	7½
27. Transportation	7½
28. Salvage	10
29. Machinist Helpers	10
30. Dippers in Dept. M	10
31. Balancer & Undercutters in Dept. M	10
32. Hand Burners	10
33. Template Makers	7½

[Endorsed: Filed Sept. 16, 1943. B. H. Westfahl, Clerk.]

25 In the District Court of the United States

[Caption—1087]

Transcript of proceedings before Honorable F. Ryan Duffy

September 16, 1943

(Filed Sept. 27, 1943. B. H. Westfahl, Clerk)

In the District Court of the United States

[Caption—1087]

Transcript of proceedings of trial

Be it remembered that heretofore, to wit, commencing on Thursday, September 16, 1943, at ten o'clock A. M. of said day, the above-entitled matter come on for trial before the Honorable

F. Ryan Duffy, Judge of said Court, upon the pleadings heretofore filed herein.

Appearances: Victor M. Harding, Jr., Esq., Joseph D. Donohue, Esq., and Frank J. Delany, Esq., on behalf of the plaintiff. Lines, Spooner & Quarles, by Maxwell Herriott, Esq., and Leo Mann, Esq., on behalf of the defendant.

(Thereupon the following proceedings were had and testimony taken:)

The COURT. I think before a statement is made that for the record we shall say that as a result of the pretrial conference the contract in this case was submitted to the court and that the defendant then moved, under 12-D of the Federal Rules of Civil Procedure, to dismiss the complaint. The plaintiff questioned the right to proceed in that manner under 12-D, and the defendant then asked leave to have the motion considered as under Rule 56 for summary judgment.

The plaintiff further contended that the court could not properly pass upon or have a full knowledge of the situation without some additional testimony or a stipulation as to the facts.

So, therefore, the motion may be considered denied, but I will say that in denying it I am not considering the merits that were involved but rather agreeing with plaintiff's contention that it might be a better manner in which to proceed, to take the testimony that may be offered at this time in connection with the stipulation of facts which, I understand, has been presented this morning, or been filed this morning.

Now, see if I get from the argument that we have had before the contention of the parties.

It is the defendant's contention here that the contract did comply with 7-A of the Fair Labor Standards Act, in that it called for one and one-half times the regular rate at which the employee might be employed as to the incentive worker and they contend that the incentive pay may or may not be earned, that it cannot be known at the beginning of the employment or at the beginning of the work week what the amount of that pay might be.

It is the Government's contention, as I understand it, that what that contract called for is not one and a half times the regular rate of pay at which the employee is employed, that they concede that it is one and one-half times the base rate of pay, but that they contend that the regular rate of pay is what the employees actually receive as the result of the incentive bonus or the pay that it becomes by reason of the provision as to incentive workers.

Now, if I haven't stated that correctly as you each understand it, you may make your statement in view of that and correct me.

That is just my impression now without having put it down in accurate form, perhaps.

Mr. HARDING. As far as the plaintiff is concerned, you have actually stated the issues in this case. In other words, the only issue here is as to whether the defendant has paid overtime under Section 7–A of the Act. There is no other issue in the case.

The defendant concedes it is engaged in interstate commerce and covered by the Act. Consequently, the only facts that we wish to offer in evidence are the actual method by which the company compensates its incentive workers and bring before your honor the actual facts in the case. We think those facts
27 are important in determining what is the regular rate of pay for the purposes of Section 7–A of the Act.

The COURT. Any further statement, Mr. Herriott?

Mr. HERRIOTT. If the court please——

The COURT. Or did I state it correctly in your view?

Mr. HERRIOTT. Yes; with one exception. We, too, are joining now in trial by setting forth the facts wherein we example the methods by which the men are paid.

There is one additional factor. We contend that under the Statute and the decisions, that the employer and employee, having agreed on the regular rate of pay in accordance with the Act, in the absence of fraud that is controlling.

The COURT. You are basing that on the statement of Justice Byrnes in the Below decision?

Mr. HERRIOTT. And the Act itself, which is the regular rate he is employed at in the contract, which in this case is in writing.

The COURT. You may proceed, Mr. Harding.

Mr. HARDING. Should I start by reading the stipulation?

The COURT. If you want to read it all or any part of it you may do so at this time.

Mr. HARDING. It isn't very long, and I will only read those parts which I consider as significant.

The defendant, Harnischfeger Corporation, which, as your honor knows, is engaged in the operation of a plant here in Milwaukee constructing heavy machinery, employs approximately 2,615 production employees in and about its plant, of which number 1,238 are classified under the contract as incentive workers. In other words, approximately one-half of the production employees are incentive workers. I might say, incidentally, that we are only concerned with incentive workers. There is no contention on our part that other employees are not properly paid overtime.

The total compensation paid by the defendant to its incentive workers on a biweekly pay roll, which is the method when they are paid every two weeks, based on the month of May 1943, is approximately $207,000, which amount breaks down as follows as

far as base pay, overtime premium, and piecework bonuses are concerned: The total is $207,000; $149,000 consists of base pay, $14,000 represents overtime premium, and $43,000 represents incentive or piece-rate earnings over and above base rate. In other words, piece-rate bonus, you might say. I am pretty sure those figures add up to $207,000.

28 In reading paragraph 4 of the stipulation, in each pay roll approximately 98 and ½ percent of all incentive workers receive incentive or piece-rate earnings in some amount, and approximately one and one-half per cent receive nothing but their base rate of pay, plus any overtime, under Section 4 (a) of the contract.

Under the Union contract, the defendant agrees to pay vacation pay to the incentive workers at their average hourly earnings, not at their base rate, and for each incentive worker the company computes his average hourly earnings at the total base pay, including Defense Wage Adjustment of about 5 cents an hour, plus the incentive or piece-rate earnings received by the employee and divides that by the total number of hours worked in the pay period, and that is his average hourly earnings. No overtime premium received by the workers is included in the computation of his average hourly earnings, and then we set forth in the stipulation a representative list of incentive workers, and opposite each man's name we put his base rate of pay and his average hourly earnings.

Incidentally, it is the contention of the plaintiff that overtime should be based on the average hourly earnings as against the base rate. So your honor can see from that the amounts involved here, that is, the difference between what we say is the regular rate of pay and what the defendant says is the regular rate of pay.

And in the last paragraph of the stipulation: "During the period since October 24, 1938, the defendant has never paid any incentive worker for hours worked in excess of 40 per week at more than one and one-half times his base rate of pay except where the contract calls for a greater percentage of his base rate. The incentive worker's piece-rate earnings over and above his base rate have never been included with the base rate of pay in computing overtime compensation for incentive workers."

I would like to call Mr. Menck to the stand.

The Court: The stipulation as to facts will be received in evidence.

29 HERMAN MENCK, called as a witness herein, on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. HARDING.

Q. And your name is?

A. Herman Menck.

Q. And your address, Mr. Menck; home address?

A. 7310 Grant Parkway, in Wauwatosa.

Mr. MANN. Mr. Menck, will you speak up so we can hear?

A. 7310 Grant Parkway, in Wauwatosa.

By Mr. HARDING:

Q. And what is your connection with Harnischfeger Corporation?

A. I am vice president.

Q. And Works Manager?

A. Vice president in charge of manufacturing.

Q. And how long have you been connected with the company?

A. Eight and a half years.

Q. In the same capacity?

A. No; in this capacity as vice president only for about a half a year. I was Works Manager only before.

Q. I see. In your capacity as Works Manager, what are your duties?

A. I direct all the production departments of the company.

Q. Now, you are familiar with the Union contract which the company has with the bargaining agents of its production employees?

A. Yes, I am.

Q. And you are familiar with the classification known as incentive workers?

A. Yes, I am.

Q. Now, the incentive worker has two elements of his wage, has he not, namely, he has his base rate and he has his piece-rate bonus?

A. No; that is not right. He has three elements.

Q. What would be a correct statement?

A. He has three elements of pay; his base pay, his Defense Wage Adjustment, and his incentive earnings.

Q. The Defense Wage Adjustment is merely an increase on his base rate and his piece-work earnings?

A. That is right.

Q. And that is merely for the duration of the war?

A. I don't know. I can't answer.

Q. By reason of the fact it is called a Defense Wage Adjustment, I take it; it was established as a result of the war?

A. Well, those are results of collective bargaining, and I can't tell you ahead of time what might happen. We are calling it at present defense.

Q. Can I express it this way: The incentive worker's wage is made up of two elements; his hourly rate, which is normally his base rate, plus his piece-work bonus?

A. Yes, you can. That is correct.

Q. Now, can you tell us how the company establishes the piece rates?

A. Yes. Is your question the piece price?

Q. That is right.

A. Piece price on a job?

Q. Yes.

A. We have rated the various operations and trades as to standard earnings; standard wage. That is based on what the district pays for that particular operation or trade. We then go and time study the operation. If we can't time study it, we estimate it on rates backed up by time studies. We establish the time it actually takes to make a certain operation or a certain job that is in question. We then add to that a percentage of allowances for fatigue, incidentals, waiting time for cranes, or any peculiar things or facilities that might be involved in making that job. We then multiply the time by the standard earning rate for that job. That is our piece price.

Q. And that piece price remains, does it, throughout, as long as that job is carried on by the company?

A. That is right.

Q. Or is the piece price changed in any way?

A. No; unless an error occurred in the establishing of the time and a grievance is presented and the job is retime-studied to show whether there was an error or not. That is the piece price.

Q. That remains the piece price throughout?

A. That is right.

Q. In other words, each job is priced?

31 A. That is right.

Q. And a job may take ten hours and it may take twenty hours?

A. That is right. It may take considerably longer than twenty hours.

Q. And does the company use the price that is placed on the job in determining the prices it charges for its products?

A. Yes, sure; that is part of it.

Q. And in addition to the price put on the job you allocate such factors as a percentage of overhead, management, and so forth?

A. That is right; factory burden and administrative overhead.

Mr. HARDING. I offer in evidence at this time, your honor, Plaintiff's Exhibits 1 to 12, inclusive.

Q. Mr. MENCK, I hand you Plaintiff's Exhibits 1 to 12, and ask you if those sheets show the hours worked and the wages paid to the employees listed on those sheets and at the time noted there?

Mr. MANN. We stipulate to that, Mr. Harding.

Mr. HARDING. All right.

Mr. MANN. And the words "maximum," "minimum," and "average" will be eliminated?

Mr. HARDING. Yes.

A. Yes, they are.

Mr. HARDING. I also offer in evidence Plaintiff's Exhibit 13 which is based upon the Exhibits 1 to 12, inclusive, and is merely a mathematical computation of figures, and that is subject to Mr. Mann's verification of the figures.

The COURT. Well, Exhibits 1 to 12 and Exhibit 13 will be received.

(Said documents, marked "Plaintiff's Exhibits 1 to 13," inclusive, so offered, were thereupon received in evidence.)

Mr. MANN. We are assuming the computation is correct.

The COURT. Well, if there is anything about it that isn't correct you can call it to the court's attention later.

By Mr. HARDING:

Q. I also hand you Plaintiff's Exhibit 14, Mr. Menck, and ask you if that is a correct copy of a speech which you delivered to employees at Harnischfeger on or about the date it bears?

32 A. That is it. That is correct.

Q. And I hand you Plaintiff's Exhibit 15, and ask you if that is a list of the standard rates used by the company in determining piece rates?

A. Yes, it is.

Mr. MANN. Mr. Harding, may it be understood that on Exhibits 12 and 13 that the headings of the columns, that the form itself is a standard Government form and the headings of the columns are those used by the Government, not necessarily the terminology used by the company?

Mr. HARDING. There is no particular significance in the headings.

Mr. MANN. On either Exhibit 12 or 13?

Mr. HARDNG. That is right.

The COURT. Very well.

By Mr. HARDING:

Q. What is the relationship, Mr. Menck, between the base rates which the company establishes for incentive workers and the standard rates?

A. They are very much in line.

Q. Are they identical?

A. I would not say that they are identical.

Q. In what way would they differ?

A. I don't know them all. I can't tell you whether they are identical. They may be a little higher in some instances.

Q. Well, how does the company determine, in the first instance, the base rates?

A. Well, whatever you can hire people for in the district.

Q. Isn't that what you use in your standard rate? You were saying that is the rate current in the district?

A. Yes; that is true, but supposing you have a department that you were hiring people for, for a period of time, at a certain base rate, you could get them; then the market is absorbed, I mean all the people that can perform that operation are hired. You may have to go a little higher on your base rates, and that will throw you off the base rates.

Q. Also, if your competitors are paying higher rates than you are, would your standard rate be higher than your base rate?

A. Which way do you mean "competitor"? As far as
33 I am concerned, every plant in Milwaukee is a competitor, bidding for labor.

Q. Taking "competitor" in that sense, if your competitors are paying higher wages than you are, would your standard rate be higher than your base rate?

A. My base rate may be higher than my standard rate, could be; probably is right now in some instances.

Q. Then you wouldn't be paying lower than your competitors, would you?

A. No, I can't. I wouldn't get any help, then.

Q. What I am trying to get at is how do you determine to set these standard rates?

A. They were determined way back when as to a certain relationship between certain operations right in there, value of operations. Some require more skill, and——

Q. Excuse me. Have you finished?

A. Some operations that are given on this exhibit you show me require more skill than others, and there is a certain relation set up. A boring bar operator is more valuable, needs more experience and more training. His standard earning on there is higher; the rate that we apply for a time study is higher than, for instance, a horizontal drill press hand, which is a rather simple operation.

Q. You say these standard rates were "way back when"?

A. In 1935. That is the last revision I know of. I would know any revision if there had been any. May I add something to that?

Q. Surely.

A. You asked the question, if I understood it right: Is there a relation between base rate and standard rates?

Q. Yes.

A. There is none unless it is accidental. That is probably the best answer I can give you.

Q. Well, the standard rate is based upon the actual wages paid in the district for work of that character, not any particular base rate that might be in effect?

A. That is right.

Q. Have you used the present system of compensating incentive workers—rather, did you use the present system of compensating incentive workers prior to 1927?

A. No, I did not.

Q. What was the system you used at that time?

A. It was a straight premium system.

34 Q. And how did that work? Could you describe it in your own words?

A. On the straight premium system you study the operation for time, and on the ticket, the labor ticket, or whatever instrument you select to give the man to do the job work, you mark just time. You say, for instance, one hour. Now, if the operator's base rate is $1.00 and he does his job in half an hour, then a half hour is saved, and in our system up to 1927 we used to give the operator half of that saving and the company took half of the saving. In other words, in my example the operator would have earned the dollar working half an hour on the job; he would have earned 50 cents plus an extra quarter that he saved on not having used the hour that was allowed.

Q. And how was that 25 cents figured?

A. On his base rate.

Q. It was one-half?

A. Well, whatever his base rate was.

Q. In other words, his premium in a case of that sort was a percentage of his base rate, was it not?

A. No; it was not. There was a definite time he saved multiplied by his base rate. Suppose he saved a half hour on the job.

Q. Yes?

A. The company took half, he got half. That would be a quarter of an hour that he got coming for not working, which would be 25 cents if his base rate is a dollar.

Q. I see.

A. There is no percentage of his time multiplied by his base rate.

By Mr. MANN:

Q. Full hour at base rate?

A. At base rate.

By Mr. HARDING:

Q. And if a man whose base rate was $2.00 an hour did the same job in a half an hour, what would his premium be?

A. Well, his would have been 50 cents.

Q. So, although he might not do any more work than the other man, his premium would be twice the other man's because his base rate was higher?

A. That is right. The premium was in direct relationship to the base rate.

Q. Well, now, can you explain what change was made to come into your present system?

A. Well, the present system is a straight piece-rate system, and we, instead of putting time on the job, put a dollar value on the job, and whatever earnings the operator may make is entirely in what time he does it. Let's assume that same example. We have a job instead of having an hour on we put a dollar on, and the operator is rated a base rate of a dollar, to make the example alike again, and he does the job in half an hour, like we assumed the other fellow did; he would earn $1.00 in half an hour. He actually would earn $1.00 an hour.

Q. The net result is that if you have two men doing the same type of work and the first man's base rate is 50 cents and the second man's base rate is $1.00 an hour, and they each do a $2.00 job in one hour, they would each get the same pay, $2.00 each?

A. That is right.

Q. So, in other words, you took the emphasis off the base rate; the premium wasn't based upon the man's base rate, it was based upon the job he did?

A. That is correct. However, of course, that is a very hypothetical case you are quoting.

Q. Well, they are all hypothetical.

A. You take a man earning a 50-cent base rate and another one a dollar base rate, you can rest assured they won't both make it in the same time.

Q. I was taking——

A. It misleads the court into thinking that the base rate has no effect or is not an expression at all of the man's ability, and under the system that I have now, which you asked me to explain, the man's ability is the only thing that will make him extra earnings.

Q. Now, would you explain how the present system works with respect to a particular man? You say that each job has been time studied or an estimate has been made and a price has been put on that job. Now, a man goes to work on that job, he fills out a particular card, does he not?

A. He receives the card on which the job that he is to do is marked. Let's assume, for example, say, he gets a lathe operation. The ticket has a part number on it and the operation he is to perform, the second or third operation on the piece, and it is hooked in the lathe operation, and the ticket will carry the
36 price we allow for set-up of the job and the limit we allow for each piece and the total of the entire job. If it is ten pieces, it is ten times the limit each, plus the set-up time, is the allowance for the whole job. The man enters his own clock number, punches in, and goes to work.

Q. And then if the job is completed in a shorter time than the time allowed on the job the man is paid the price put on the job?

A. You are back to the premium system. Time doesn't play any part; particular part. If you want to know how it is calculated, after the job is finished this is done: The man's base rate is multiplied by the hours that he put in on that job, and that is deducted from the total allowance for that job. Assuming now he made piece-work earnings——

Q. Yes.

A. And the difference between the multiplication of hours he worked and his base rate and the total allowance on the job is the premium earnings he made on that particular job.

Q. That is a piece-rate bonus or incentive premium; isn't that right?

A. That is a piece-work earning; it is an earning that he made.

Q. Over and above his base rate?

A. Over and above his base rate.

Q. Yes.

A. Of course, it can also be the case, and it is unfortunately too much nowadays, that the multiplication of his base rate times the hours he put in exceeds the limit that we had on the job, and he is paid the limit on the job plus what he exceeded it by his base rate multiplication, and that is what we call excess labor.

Q. I understand that. Well, now, if an employee consistently falls below the piece rate on the job, in other words his base rate consistently exceeds his piece-rate earnings, what does the company do about a man of that sort?

A. Well, you are asking me that question in 1943, I just weep.

Q. I mean in normal times, when there is an adequate labor supply, what do you do?

A. We don't like to have them do that. We like to have him at least earn his base rate. We like to try to get him up to earn his base rate and earn a little incentive if he can, but we don't like him to stay consistently under.

37 Q. And if he does stay consistently under you get rid of him?

A. We do occasionally. It depends on the case. I don't want to go on record and make any hard rule on that. We have no rule on that. We treat each case on its merits.

Q. Now, I take it that most of the jobs that an incentive worker performs work on are rated jobs; there is a piece-work price put on the job; is that right?

A. Yes. It is our aim to have the incentive workers do as much work as possible under the incentive system.

Q. However, there are a number of jobs which have not been time studied, I take it, and on which no rate has been placed?

A. That is right.

Q. But an incentive worker may perform work on such a job?

A. That is right.

Q. And what is your policy under those circumstances?

A. Well, you usually—these kind of jobs that you have reference to are in most cases where a job does not perform on test. In other words, the operation is all done and the job comes on the shipping floor and we test it and it doesn't perform. It has to be ripped apart again and see what is wrong with it, and usually you will have to ask your best men to do that, and your best men usually are on some piece-work earnings. Now, if you ask him to do that on a day work rate, he would say, "You have robbed me of the opportunity to earn some piece-work earnings." So, through the process of collective bargaining, we have inserted in our contract a few paragraphs to tell the fellows we won't be so bad, we will give you some adjustment on the time you have to spend for us to fix up the job, and there are two or three paragraphs in the contract covering that.

Q. And the contract is, is it not, that you agree to pay 20 percent over and above their base rate for such jobs?

A. That is right.

By Mr. MANN:

Q. Not less than 20?

A. Not less than 20.

Mr. MANN. Do you mind if I say Paragraph 3–H–I of the contract?

Mr. HARDING. Yes.

38 Q. Well, now, when a man, an incentive worker, works on such a job and he gets paid, we will say, 20 percent over his base rate, what do you then consider to be his regular rate of pay for overtime purposes?

A. His base rate.

Q. In other words, if his base rate was $1.00 and on a non-time-study job you agree to pay him $1.20 an hour, you still consider his regular rate of pay to be $1.00.

A. Well, I don't entirely. If you want to state it that way you must take another clause in the contract into consideration, and that is if he does not perform satisfactorily we can cancel the 20 percent.

Q. I am assuming a normal case where he performed the job satisfactorily and under the contract you have agreed to pay him 20 percent over and above his base rate on such a job; isn't that right?

A. Yes.

Q. Now, under such a circumstance his base hourly rate jumps up to $1.20, isn't that right?

A. No.

Mr. MANN. I think, if the court please, that is calling for a conclusion on the construction of this contract.

The COURT. Yes; I think possibly so. There could be a difference of opinion.

Mr. HARDING. The contract, your honor, is not quite clear on how the company pays overtime when the man's base rate is increased 20 percent under this clause.

Mr. HERRIOTT. If the court please, we stipulated we pay overtime only on the base rate and Defense Wage Adjustment.

Mr. HARDING. Under those circumstances the man gets time and a half on his base rate only?

Mr. HERRIOTT. That is right.

By Mr. HARDING:

Q. Are there times when an incentive worker might perform work on a non-time-studied job or jobs over a period longer than a week?

A. Oh, no; none to my knowledge.

Q. Now, the company used to have the policy, did it not, of reducing the piece rates on jobs where employees consistently made 20 percent over and above their base rate?

Mr. MANN. May I have that question read, please?

(Pending question read by the reporter.)

A. I answer that "No."

39 By Mr. HARDING:

Q. I refer you to——

A. I know that paragraph better than you do.

Q. I refer you to the contract and ask you to read the provision at the top of the page.

Mr. MANN. What page?

Mr. HARDING. Page 4.

A. "In the interest of maintaining fair piece work rates and encouraging employees to disclose erroneous piece work rates, the Company agrees that, except for changes justified under the

foregoing paragraph, it will not cut any rate established and based on its standard earning rate for the operation involved, or question the correctness of such rate, even though the employee is able to turn in as much as twenty (20%) per cent over the standard earning rate. The Company, however, reserves the right to question rates where earnings exceed twenty (20%) per cent over standard earning rates."

Q. Doesn't that last sentence indicate that the company would reduce the piece rate where the earnings were 20 per cent over the base rate?

A. I understood the question to be: Is it the company's policy to cut those rates? And I answered "No." We merely reserve the right to question his rate. That is a big difference.

Q. Then take my last question.

Mr. HARDING. Would you read that back?

(Pending question read by the reporter.)

Mr. MANN. Mr. Harding, you probably misspoke. You meant 20 percent over standard earning rate.

Mr. HARDING. All right. Change that to standard earning rate, then.

Mr. MANN. I object to that, too, as calling for the witness's conclusion of the contract.

Mr. HARDING. I didn't ask him to give his construction of the contract. I merely asked him what the company did under those circumstances. The contract doesn't say what the company does.

The COURT. Objection will be sustained.

By Mr. HARDING:

Q. Well, does the company ever reduce the piece rate where the men exceed 20 percent over standard earning rates on a job?

A. Yes; we do, occasionally.

Q. And in what instances does it?

A. If a fellow is able to turn in a ridiculously high earning there must be an error. We have a method now of reducing that rate, and the method is as follows:

The employee that is able to make this earning must come to us and say he wants that rate reduced, and it must be a reduction greater than 20 percent before we will talk to him. Then we will ask him, "What do you want the rate to be?". We put that rate on and we turn this card over to the Labor-Management Committee at the plant. They examine the circumstances under which this offer of a cut of a piece-work price was made. If they all agree, and there are five members of management and five members of labor on that committee—if they all agree, that card goes on file and a new rate is put into the Time Study Department.

Q. I understand that is your present policy in view of your statement to the employees that you would not cut piece rates made last year?

A. Yes.

Q. But prior to the time you made that commitment to the employees——

A. We have cut rates prior to that time.

Q. What is the reason for the company cutting piece rates? You don't lose anything if the man makes 500 percent of his base rate, do you? How does the company lose?

A. If the Time Study Department makes an error and puts in an operation that is worth a dollar $10, the company loses nine.

Q. Not if the company has figured that price into the value put on his products?

A. We don't figure all our prices ahead.

Q. No. But I understood you to say sometime back that the piece-rate price put on the job is one of the elements of cost that you figure into the price you charge for your products?

A. That is correct, but——

Q. Well, then——

Mr. MANN. Just a minute. Let him finish.

The COURT. Let him finish his statement. Go ahead, Mr. Witness, finish what you were going to say.

A. That is correct; but like an overhead crane and an excavator, you establish your sales price; you have no
41 order, and you have, consequently, no piece work until the crane is sold. You establish that on past experience, and then when you have the job, then first the Time Study Department will go to work after the job is engineered and put piece rates on, and maybe that same piece rate will repeat again on some other job later sold, maybe it will not, but we don't in all instances establish piece rates for every job we make on an overhead crane until the job is sold. We are not a shop that produces the same item over and over again. We are producing a different item almost every time we make a sale, and, naturally, when an error is discovered where a man can earn a ridiculous rate, there must be some correction, because your cost when it is turned in to pay $10 for a $100 job is poor management. You must have some means of relief if an error is made.

By Mr. HARDING:

Q. Aside from errors in the computation in the time study, isn't it true that no matter what the incentive workers make in the way of piece-work earnings the company does not suffer?

A. Well——

Q. I will rephrase the question.

The COURT. I can't see any sense to that statement. Suppose you figured you were going to make $100 on a job and you make $150, the fact you figured you were only going to make $100 on the job in the first place you can't say the company didn't suffer because they don't make $150.

Mr. HARDING. That wasn't the question, your honor.

The COURT. They might have figured on their cost they were going to make a hundred but they find they can make $150, and your question is because it is based on the idea they originally thought they were going to make a hundred and they are nothing out because they didn't make $150.

Mr. HARDING. No. My question was if the piece-worker is very efficient and he makes a number of units in a comparatively short time and therefore gets a high piece-work bonus, you might say, the company benefits just as much as he does because he has turned out the units. The company has priced each of those units, we will say, at $1.00 each, and he may turn out five of them in
42 an hour; although his base rate may be only a dollar, he is entitled to $5.00. Now, the company does not suffer by reason of the fact they had to pay him $4.00 over his base rate because he has turned out five times as much as he was expected to turn out.

A. That is correct, and we won't cut that price neither. The only time we will cut a price is when there is an error in the rate, an apparent error, or change in the job.

Q. But aside from error, the company benefits along with the piece-worker in the speed with which he turns out unit.

A. Of course you do.

Mr. HARDING. I think I probably phrased that question improperly, your honor.

Q. You are familiar, are you not, Mr. Menck, with Sections 3-H-1 of the contract?

A. Yes, I am.

Q. What was the reason for taking the figure of 20 per cent in those paragraphs?

A. The result of collective bargaining.

Q. Are there any other explanations of it? In other words, those provisions provide for an incentive worker getting 20 per cent over his base rate when he does certain types of jobs; isn't that right?

A. That is right.

Q. Well, why didn't you take 10 per cent or 30 per cent; why was it 20 per cent?

A. Well, the fellows that bargained for the contract probably would like it to be 100 per cent.

Q. Why would the company be willing to pay any more than the base rate?

A. Because, usually, on those jobs you take your men that are able to earn more on piece-work.

Q. In other words, a man is expected to make more than his base rate on those jobs?

A. That is not correctly putting it. We don't expect any man to make any piece-work; that is up to him if he wants to. We like to see him make it. Now, if a fellow that is in the habit of earning some piece-work, is a good worker and applies himself, and we ask him to do a day work job, it is only fair that we pay him something over his base rate because we took the ability away from him to earn for two or three hours piece-work jobs because we ask him to do a day work operation.

Q. Well, would it be correct to say that he could be
43 expected to make 20 per cent over his base rate on other jobs?

A. No.

Q. Therefore, you agree to pay him 20 percent over on a job that is not time studied?

A. No. I can show you the best men in our place that sometimes they don't earn a cent. They are not expected to earn any percentage.

Q. I am not saying the company expected, but I say in the average instance he makes 20 percent over his base rate on the normal job, and therefore you agreed to pay him 20 percent over on a nonrated job?

A. Well, you make me—I can't answer that correctly. I can't answer that.

Q. Section 4–F of the contract contains a provision for men who report for work on a particular day and there is no work available for them, and the company agrees to pay a certain compensation under those circumstances, and the phrase used, I believe, is four hours of day rate; you notice that?

A. Yes.

Q. What is the day rate?

A. Day rate and base rate is the same.

Q. It is the same as base rate?

A. Same as base rate.

Q. Section 4–D of the contract provides for a shift differential, does it not, of so much an hour?

A. That is correct.

Q. In other words, if a man works on the night shift he gets 5 cents an hour more. Is that added to his base rate?

A. Now, this is not correctly stated the way it is actually any more. This has merely been repeated over the last five years and

not corrected. That is why it is in there. It actually now is this way: An employee coming to work for us at twelve o'clock noon, he gets for every hour that he works five cents; an employee coming to work for us at six o'clock P. M., he gets eight cents.

Q. Over and above base rate?

A. Yes; but his base rate don't change. We merely pay that on every hour he worked.

Q. When you come to pay overtime——

A. We pay overtime; yes.

Q. Do you pay overtime on the base rate?

44 A. Plus the—we guarantee him that.

Q. I see.

A. The only reason that is kept separately like it is, is so that we are able to take a man from the day shift and transfer him for one night to the night shift to help us out; he is entitled to it. If you keep changing his base rate, our record would be as long as an arm. We kept that separate.

Q. I see. Now, in Section 3–F you provide for a slight increase for cranemen?

A. Yes.

Q. Five cents an hour over the regular craneman's wage?

A. Yes.

Q. Do you mean by regular craneman's wage his regular base rate?

A. No. You see, the beginner rate for craneman may be, let's assume for the moment, 65 cents, and an experienced hand is 85 cents, and this newcomer might work in one of those departments; then he gets a nickel to his 65 cents; the other guy, if he is at the 85-cent bracket, he gets a nickel to the 85 cents.

Q. Well, it increases his base rate, then?

A. It increases his base rate.

Q. Yes.

By Mr. MANN:

Q. Those cranemen are day workers, aren't they?

A. Yes.

Q. Not incentive workers?

A. Not incentive workers. They are day workers.

Mr. HARDING. I see.

Q. And the Defense Wage Adjustment which is spoken of in the contract, that also is added to the man's base rate, is it not?

A. Yes; yes.

Q. And overtime is paid on that?

A. That is right.

Q. Why was it the company pays overtime on the Defense Wage Adjustment and these shift differentials but not on the piece-work earnings?

Mr. MANN. Object to that as argumentative.

The COURT. Objection sustained.

Mr. HARDING. What is the ground of objection, Mr. Mann?

45 Mr. MANN. Argumentative.

The COURT. You are going to ask him why the contract is something different than it is, why it isn't something different than it is. I don't think that is proper.

By Mr. HARDING:

Q. Attached to the contract, Mr. Menck, is an exhibit which lists certain increases in rates for certain types of jobs, in terms of percentages. Are those percentages of base pay or piece rates?

A. Base pay.

Q. Base pay?

A. Base pay; with the exception of two, they are all day operations.

Q. And with respect to the two incentive operations, they refer to base rate?

A. Base rate only.

Q. How long have the present base rates been in effect for incentive workers?

Mr. MANN. Mr. Harding, you mean the individual base rate of the individual man?

Mr. HARDING. Well, the wage classification, schedule of base rates. Of course, each man may be increased from one classification to another, but I mean the rates for the different types of jobs.

Mr. MANN. Your question assumes there is a general classification and assumes something not in evidence, doesn't it?

Mr. HARDING. I assume the company has a job classification.

A. That is correct. The present high base rate for the department, the top base rate for the department, I believe has been in effect since 1941. I think that has been our last increase. The Defense Wage Adjustment, I believe, went into effect in 1941, but I am not sure. You can check the record.

Q. So far as the Defense Wage Adjustment, has there been any increase in the last four years?

A. Oh, yes; yes. I think in the last four years there has been three increases.

Mr. MANN. You are speaking——

Mr. HARDING. Excuse me.

Mr. MANN. Mr. Harding, you are referring to general increases, of course?

Mr. HARDING. Wait a minute.

46 Mr. MANN. Let's clear this up and see what the witness says.

By Mr. HARDING:

Q. I refer you to Section 3–C of the contract covering wage rates, and you notice the statement that the hourly rates, or rather, "the base rates and piece rates for incentive workers as established in the 1940 to '41 agreement and currently in force shall remain in effect and be the basis for computation of regular earnings"? What I would like to know is how far back in 1940 do those same rates go.

A. Well, that means I have got to remember just when we gave these increases.

Q. I mean just roughly, if you recall.

A. I think from '39 to '41 we have had three wage increases. In '38 we had a wage decrease.

Q. Have there been any increases since 1940? That statement leads you to believe that there haven't been.

A. No; it doesn't, if you finish on, "for the life of this agreement subject to the Defense Wage Adjustment." I count that an increase.

Q. Other than the Defense Wage Adjustment, has there been any increase?

A. No.

Q. The Defense Wage Adjustment didn't change piece rates, did it?

A. No.

Q. So there have been no changes in piece rates since 1940?

A. That is correct. Well, it doesn't say that. As they were established in '40 and '41. There was a change between '40 and '41.

Q. Well, that refers to the 1940 contract, doesn't it?

A. Yes.

Q. Well, now, has there been any change in piece rates since the 1940 contract was signed?

A. Oh, yes.

Q. Doesn't that statement lead you to believe that there were not?

A. Everybody got one there. Some were established in the 1940 and some in the '41 contract, see.

Q. I am not sure I understand you. How do you mean some were and some were not? Here is says they shall remain the same.

47 A. Maybe I can explain it to you this way: Supposing I negotiate a new contract——.

Q. Yes?

A. Only this exhibit A group was fixed in this contract for a new rate. Some are still in the same rate they had in 1940. I would have to say the rates fixed in '40, '41, and '42 shall remain,

because there is only a certain group in the '42 contract that got a raise.

Q. I see.

A. And you have to fall back to their agreements where the last group had no more increases.

Q. Well, of course, the raises attached to this 1942 contract were raises in base rates, you said?

A. That is right.

Q. So they didn't affect the piece rates?

A. They didn't affect the piece rates.

Q. Have there been raises in connection with other contracts since 1940 that raised the piece rates or changed the piece rates, or do they only change the base rates?

A. I think they have, but I would like to refresh my memory before I testify on that.

Q. Would you say that the piece rates at the present time are substantially the same as they have been since 1940 on those jobs which were the same as those you did back in 1940?

A. No; there has been one increase, I am almost sure. They are not substantially the same. There is an increase from '40 to the present time for some groups, some pretty large groups.

Q. Have there been changes since 1941?

A. No, no.

Q. Since January 1, 1941, there haven't been any changes in the piece rates?

A. In piece rates, no; there haven't.

Q. Well, would you say that the incentive workers at the present time were making more than they were back in 1941?

A. Yes; I would say so.

Q. And is that due entirely to the fact they are working longer hours?

A. No.

Q. What is that due to?

A. They are putting in a better effort than they did before.

48 Q. In other words, their piece rate bonus or earnings have gone up in the last two years?

A. That is right.

The COURT. Any further questions of this witness?

Mr. HARDING. Excuse me, your honor.

The COURT. I have been waiting three or four minutes with no questions asked. Proceed if you have anything further to ask.

By Mr. HARDING:

Q. Mr. Menck, do men of the same ability of the incentive production workers have the same base rate, or is there a wide variation between base rates as to the same character of man, worker?

A. No, there isn't. You are asking the question of ability. You say the men of same ability?

Q. Yes.

A. There is no variation in the base rate. You are talking now about two men performing the same kind of trade?

Q. That is right.

A. No; there would not be.

Q. And the same general type of ability—they have the same base rate?

A. That is right.

Q. If you start off two men at the same base rate, starting base rate, and one shows a greater efficiency or ability than the other man, is his base rate increased?

A. We used to. If his base rate is high in the department or the operation now we can't no more.

Q. I am talking about normal times, not since wage stabilization.

A. In normal times, yes.

Q. In normal times; yes, what?

A. We will increase the man that has a higher efficiency.

Q. You will increase his base rate?

A. Yes.

Mr. HARDING. No further questions.

Cross-examination by Mr. MANN:

Q. Mr. Menck, how far back has it been the practice at Harnischfeger to pay time and a half over 40 hours a week?

49 A. 1933. Your question was 40 hours, wasn't it?

Q. Yes; over 40 hours.

A. 1933.

Q. In answer to one of Mr. Harding's questions, he asked you whether the pay of an incentive worker did not consist of two items, his base pay and his incentive earning, and you say "Yes." Does he receive incentive earnings if he doesn't earn them?

A. No.

Q. In other words, you mean the incentive worker gets his base pay plus incentive earnings if on the price paid upon the job he does it in the amount of time where the price is more than the base rate for that length of time?

A. Where the piece-worker does not make out on the price limit that we have, multiplying the hours that he took by his base rate, his pay, naturally, consists only of his base rate.

Q. Let's assume your price is $5.00 and the man has a base rate of $1.00, and he takes six hours to do the job. How much does he get?

A. Six dollars.

Q. Is there any piece-work earnings in that $6.00?

A. There is no piece-work earnings in that $6.00.

Q. The entire amount he is paid is six hours at his base rate?

A. That is right.

Q. And he is an incentive worker?

A. That is right.

Q. In describing the method by which you fix your piece-work prices, you start out, you said, with what is shown on Exhibit 15, I think it is, the standard earning rates?

A. That is right.

Q. That is the figure that the company has determined is a fair figure for the various jobs or operations calling for the skill of the particular type of man involved?

A. That is right.

Q. And those figures are in the Time Study Department?

A. That is correct.

Q. Does the Time Study Department in fixing the piece-work price—are they interested in any way in the base rate of the individual man who is going to work on the job?

50 A. No, they are not.

Q. I think this has been covered, but I want to be sure: The contract calls for what is commonly called a night shift bonus or differential, second and third shift bonuses. Does the company pay overtime on that bonus?

A. Yes, we do.

Q. Now, Mr. Menck, approximately what percentage—excuse me—confining it now to incentive workers only, approximately what percentage of jobs performed by piece-workers, incentive workers, are done by a group of men working together and what percentage by a man working alone?

A. About 98 percent is done in groups and 2 percent by operators alone.

Q. Now, a group of men working together, they consist of only two men, one on the night shift and one on the day shift; is that right?

A. Yes, that would be a group, or an assembly operation is, maybe, six, seven men on the same shift in one group, or on welding operations two or three operators may be on the same shift in the same group, and, in turn, the two or three night men belong to that entire group of six, then.

Q. Now, when the incentive workers work in groups of this kind you commonly call them partnership jobs, do you?

A. Those are partnership jobs.

Q. Now, at our request you have prepared some examples to show how the earnings of incentive workers are computed at your company, have you not?

A. That is right.

Q. Now, Defendant's Exhibit A is an example of No. 1; the first example is how the incentive pay is figured when one man does the work alone?

A. That is correct. On this example here, the price limit is $10. It took the man seven hours—no, it took the man ten hours to complete the job, and he had a base rate of 70 cents an hour; so his earning on his base rate was $7.00 on that particular job, and he earned $3.00 in piece-work earnings.

Q. Now, in this example, you are assuming that he had two hours of overtime on that day, whether it was on this job or not?

A. I suppose it was taken because the job was timed
51 at ten hours. A ten-hour job was taken, and two would be overtime, over eight in one day, and he would get for the two hours overtime pay, well, we call is 70 cents here; I see it has been done very correctly, twice 35 cents, half his base rate.

Q. That makes the total amount of the job——

A. Total amount on that job, $10.70.

Q. That can be broken down into $7.00 earnings on his base rate, $3.00 piece-work earnings, and 70 cents overtime premium?

A. That is correct.

Q. Now, Example No. 2 is an example of a partnership job, is it not?

A. Yes.

Q. Will you run through that in the same general way?

A. The example, taking the limit on the job, is $120, and three men are working on it. The men are called A, B, and C here for example sake. Man A was a 64-cent base rate, worked 25 hours on the job. Man B was 64 cents, worked 50 hours on the job. Man C was a $1.00 base rate, worked 48 hours on the job. Multiplying the hours of work by their base rate we find a total base rate earning of $96. That leaves a piece-work earning to the group of $24. Then Operator A whose base rate is 64 cents, he gets $16.96 times 24, which is a total piece work earned as his share in the premium.

Q. In other words, his share of the total base rate earnings was $16.96, so he got that percentage of the piece-work earnings?

A. That is right; $4.00. B the same and C the same.

Q. That is the same principle?

A. The same principle. That divides the $24 of earnings in piece-work rate between the group of $4, $8, and $12.

Q. In the ratio of their base rate pay?

A. In the ratio of their base rate pay; yes. Now, it is also here assumed they are working overtime, which they must be probably

doing with a job of that size. A worked five hours, B worked 9 hours, C worked 8 hours; total overtime pay amounts to $6.56, which again is for every hour worked overtime they get half of their base rate pay extra, so that gives the total cost of that job $126.56.

Q. Now, Mr. Menck, you have already testified that when a man working, let's assume, five hours on a job at
52 a dollar base rate, or $5.00 base rate pay, produces in those five hours a job that has a piece-work price of $4.00, he is paid the $5.00 base rate pay. What do you call that $1.00, the difference between the $5.00 base rate pay he is paid and the $4.00 piece-work price that was on that job?

A. Excess labor.

Q. Now, on the second page here you have an illustration of an example of computing excess labor, have you not?

A. That is correct.

Q. Will you run through that in the same way, please?

A. The piece work on that particular job is $90. Three men worked on it, again, A, B, and C named. A put in 25 hours at a 64-cent base rate, so he earned $16 base rate earnings. B worked 60 hours at a 64-cent base rate; he earned $32. C worked 48 hours at $1.00 base rate; he earned $48. The total base rate earnings paid out on the job is $96; $6.00 excess labor cost; the allowance was $90.

Q. Is that excess labor cost a substantial item at Harnischfeger each month?

Mr. HARDING. I object to that, Mr. Mann. Can't you put in the figure itself?

Mr. MANN. All right. I wanted to lead up to it.

Q. About how much is it running per month in the year 1943.

A. About $5,600 a month.

Q. What is that?

A. About $5,600 a month.

Mr. MANN. We have the exact figure. You prefer that, Mr. Harding?

Mr. HARDING. Whatever you say.

By Mr. MANN:

Q. For the seven months, January 1, 1943, to July 31, 1943, it amounted to $39,414.74; is that correct?

A. That is correct.

Q. It is a trifle over $5,600 per month. Mr. Menck, I notice in one of these examples you have a piece-work price, on Example 2, '20. What is the fact as to whether there are piece-work jobs worked on either by single men or by groups that run into more than one pay period?

A. There is quite a number of those jobs. We have jobs where the piece allowance runs over $1,000, which one
53 can readily see will run over a period of, maybe, a month or two before it is finished.

Q. Now, then, your pay periods are twice a month, are they not?

A. Twice a month. It was stated here before every two weeks. That is incorrect. It is twice a month.

Q. On one of these long jobs that runs into more than one pay period, can the company tell with any degree of accuracy what part of that piece-work price has been completed at the end of a single pay period?

A. We cannot; no.

Q. Now, then, in the case of a single man, or even a group operation, that does extend over two or more full pay periods—a pay period ends, we will say, on the 15th of July—it happens very often a man may get an incentive job on the 14th of July that he will be working on, on the 15th and 16th of July?

A. That is correct.

Q. Can you tell on the day when the pay period ends how much of the job has been completed by the man on the day of the ending of the pay period?

A. No. No; we cannot.

Q. In other words, in each of those cases, then, the company cannot determine whether there actually is any piece-work earnings until the job is done?

A. That is right.

Q. Until you see how much base rate pay the men doing the job have to be paid under your employment contract?

A. That is correct. We reissue those jobs.

Q. That is only the mechanical part of the keeping of the record?

A. Yes; we have to keep track of it over the pay period. We must pay the man off, so the only way we can handle it, we reissue that job so it is in the new period and his earnings will be finished.

Q. When you say you pay the man off, you pay him for the number of hours he worked?

A. That is right. That is all he is entitled to. I don't know what else he might get.

Q. And you cannot compute whether he has had any piece-work earnings until the whole job has been completed and you can check the piece-work price against the hours paid for at the base rate?

54 A. That is right.

Q. Is that correct?

A. That is correct.

Q. And that applies, of course, to single jobs or group jobs?

A. That is for every job; every incentive job.

Q. Mr. Menck, do you have one price for merchandise that you sell that is made on straight time and a different price for stuff that is made for which you pay overtime premium?

A. No.

Q. Do you attempt to keep track of which merchandise is made on straight-time hours and which is made on overtime hours?

A. No. You cannot because you don't know.

Mr. HARDING. Excuse me. That answers the question, I think.

The COURT. The answer may stand.

By Mr. MANN:

Q. How do you treat on your books for bookkeeping purposes the cost to the company of the overtime premium?

A. As an overhead item.

Q. Now, prior to the increase in business necessary for the war, what is the general policy of the company as to whether you do or do not want men who work overtime hours at overtime premium pay?

A. It is good management to hold the overtime hours down, and we attempt to do so, of course.

Q. In normal times, is any special permission required to have men work overtime?

A. Yes, there is.

Q. That doesn't apply during the war situation, does it?

A. Not now; no.

Q. In the stipulation there are some figures given for pay roll during the month of May 1943, a break-down between base rate, overtime premium, and incentive earnings over and above the base rate, and the stipulation says that May was taken to be a representative month. Will you tell us something as to whether there are some features of May that are special?

A. May was an exceptionally good month. We had the
55 highest shipment the company ever had in its history during the month of May.

Q. Now, turning to the portion of the contract 3-H and 3-I, do you have a copy handy there so you can look at it?

A. No; I have not.

Q. You may look at this one, if you will, please. That one is marked. Maybe you better not. I don't want to put you under the burden of even trying to read my notes.

A. H and I?

Q. Yes. H is the provision that provides for the allowance of the premium of not less than 20 percent above base rate when

an incentive worker is put on a job where a piece-rate has not been established and cannot be estimated. How often does that happen, Mr. Menck?

A. Not very often, but it does happen.

Q. What is that?

A. Not very often, but it does happen, unfortunately.

Q. Now, you said that you customarily, when an occasion of that kind arises, take one of your best men?

A. That is right.

Q. And you say that one of the factors is sometimes those men have to do repair jobs, tear down a machine?

A. That is right.

Q. And see what is wrong with it?

A. That is right.

Q. Are those repair jobs always done in the shop?

A. Yes. I will just give you a short example. Say an excavator went out into the test field and the testers discovered a noisy gear case. There may be a thousand reasons for a noisy gear case. We have to bring the machine back into the shop and strip her and strip the gear case and examine what is wrong.

Q. What I was driving at—do some of these men sometimes have to go out in the field to do some of this work, in the cold and rain, and so on?

A. Oh, yes.

Q. That is what I meant "in the shop."

A. Sometimes these excavators get pretty big and we can't get them in the shop no more when they are finished, and they have to do it outside.

Q. Taking your best man, if he has been frequently
56 earning some money above his base rate, would you feel it fair to ask him to go out and do this work or even do it in the shop and get only his base rate?

A. No; that would not be fair.

Q. Were those the elements that entered into your collective bargaining negotiation with the Union in getting that Paragraph H?

A. That is right. Basically, I agreed to the Paragraph H and I. The processes of collective bargaining fixed the percentage only.

Q. I was going to ask: Are all of these facts applicable also to the situation in Paragraph I?

A. Yes.

Q. Now, Paragraph J relates to the piece-worker doing work on a single piece or a small order job under conditions beyond his control which make it impossible for him to earn his average high

earning rate and adjustment will be made to yield such rate. Has that ever happened in your own personal experience at Harnischfeger?

A. No. It don't have to be there. I don't know of an instance.

Q. Why is it in there, do you know?

The COURT. I don't think that is important. It is in there.

Mr. HARDING. That is argumentative.

The COURT. That is the same ruling I made on Mr. Harding's question. It is in there due to the result of bargaining.

By Mr. MANN:

Q. On the next page, Paragraph N provides that the Works Manager or General Superintendent has the right to cancel the premium referred to in the previous Paragraph H and I, does it not?

A. Yes.

Q. Have you ever had occasion to use that power and cancel that premium?

A. Yes, I did.

Q. Mr. Menck, you said that during the years 1939 to 1941 there were three increases given. What type of increases were you referring to?

A. They were general increases.

Q. And you said, as I understood you, so far as base rates are concerned those were the only increases that were given. Are you again referring to general increases in base rates?

57 A. Yes.

Q. What is the fact as to whether or not individual workmen asked for increases in their base rates and what do you do about it when they are entitled to them?

A. We do give individual base rate increases. If we hire an employee we don't know much about, we won't hire him at the highest base rate we fix for that operation. We hire him somewhat lower and there is a lot of upgrading going on in constant renewal of contracts.

Q. In other words, during the course of the term of this contract you say there is constantly upgrading?

A. Yes.

Q. By that you mean that the base rates of workers are increased as they prove their merit to you?

A. That is correct.

Mr. HARDING. You are not speaking of the present time, however, are you?

Mr. MANN. Yes.

Q. That is true at present?

A. That is true at present.

Mr. MANN. Increases within established schedules.

A. At present you are limited somewhat and you can't increase the top base rate on the operation and you can only increase a certain percentage of people in the upgrading process. In my recollection, I saw it is 40 per cent in one year.

Q. You are referring to the limitation of General Order No. 31?

A. That is right.

Q. Within the limitations of that order you are constantly making increases in base rates of incentive workers as they merit?

A. That is correct.

Q. Now, you said in answer to one of Mr. Harding's questions that if you have an incentive worker in the same classification, let's say two machinists, if they have the same ability, same experience, same efficiency, they would have the same base rate. Is that necessarily true in every single instance?

A. No; it isn't necessarily true.

Q. That is what you strive to get?

A. We strive to it, and to be absolutely right there, if I am asked a hypothetical question, of course they should be alike, but in practice there are differences.

58 Q. It is a difference in judgment of the supervisor as to whether they are equal in ability and experience and efficiency; is that correct?

A. That is correct; and the fact of fixing the base rate isn't ability only. I asked counsel at the time what he meant "ability," and repeated, but judging a man's total pay you would also take into account his conduct, his attitude, his attendance. There are many other factors that will establish his pay aside from his physical ability or experience of performing a certain operation.

Q. What is the fact as to whether or not your men are constantly asking you for an increase in their base rate?

A. They do. They do.

Q. And do they get them very frequently?

A. Well, they get them. I find this order that you have reference to—I don't remember—is rather limiting to me, so I have to watch my step so I don't increase too many.

Q. You increase a great many?

A. I do that personally, and I judge I increase 300 in a pay period.

Q. You also said there was no increase in piece rate since 1941. You mean that no single piece rate has been increased since 1941?

A. Of course, there have been single increases. Counsel only got the error when we cut. We also make errors when we have

too low a price on it, and for the same reason that we correct the one that is too high, we correct the one that is lower, and that particular job is increased.

Q. In other words, you meant there had been no general increase?

A. No general increase, no; there has not.

Q. Mr. Menck, will you turn to Paragraph 3–C of the contract on page 2, please? That paragraph says, in substance, that the hourly rate——

The COURT. What section is that?

Mr. MANN. Paragraph C on page 2, 3–C on page 2.

Q. The paragraph states that "the hourly rates for non-incentive workers and the base rates and piece rates for incentive workers as established in the 1940–41 agreement and currently in force shall remain in effect and be the basis for computation of regular earnings, for the life of this agreement, subject to the Defense Wage Adjustment hereinafter provided." What elements of pay enter into what is referred to there as the computation of regular earnings?

59

A. Everything we have but the Defense Wage Adjustment.

Q. Does it include the overtime?

A. Yes. It includes overtime, piece-work earnings, base rates. The term "regular earnings" was used in that instance to differentiate all other computation of a man's earning from Defense Wage Adjustment.

The COURT. Well, I think we will recess at this time till one-thirty this afternoon.

We will stand in recess.

(Whereupon a recess was taken to 1:30 o'clock P. M. of the same day.)

MILWAUKEE, WISCONSIN,
Thursday, September 16, 1943,
1:30 o'clock P. M.

Court met pursuant to recess last above noted.

All parties present.

HERMAN MENCK resumed the stand, was examined and testified further as follows:

Cross-examination by Mr. MANN (continued):

Q. Mr. Menck, this morning you testified that you thought there had been three general increases granted. Have you checked during the noon hour to see how many general increases have been granted since 1938?

A. Yes, I did.

Q. And how many have there been?

A. Six.

Q. And in the granting of those increases, general increases, what did the general increases affect; what part of the earning?

A. Affected the base rate; piece rate and the standard earning rate.

Q. With respect to the standard earning rate figure, did you mean to state this morning there had been no change or merely no change in the relationship of one job to the other on the list?

60 A. There have been changes on the list, but no changes of trades mentioned on the list. That is what I meant to testify.

Q. Mr. Menck, with respect to the speech that you made, copy of which has been put into evidence as an exhibit, you testified this morning that for the past two years the men have been putting in better effort and that was shown in increased earnings. Will you state the occasion of the making of that speech, and what effect, if any, it had on this better effort that the men have been making?

A. It is a known fear or assumption that workmen have that if they turn in too high an earning, what they estimate to be too high or the general feeling gives them it is too high, that they hold back on the performance in order to preserve the price on that particular operation. We were interested to get as much actual work done as the Lord let us make, and I went on the stand to tell the fellows to remove this fear; regardless of what you turn in, it doesn't make any difference to me what you turn in, we will not use it as a means of cutting the rate or holding it against you in any which way, to reaffirm to the fellows that there was no cause for them to ever let the machine stand idle to preserve a rate.

Q. In your experience in operating plants, is this fear that you speak of something that is limited to Harnischfeger employees or not?

A. That is very universal. I have worked in the piece-work systems myself and I know just exactly how men feel.

Q. Did that reassurance given in that speech have any effect with respect to the effort men put out?

A. It very definitely did. The men's earnings went up as a result of that speech.

Q. You feel as a result of that speech they put in better effort and produced more materials?

A. Oh, yes.

Q. And, therefore, earned more money on the incentive plan?

A. That is right. They produced more.

Mr. HARDING. I would like to ask leave to amend Exhibit 13 on its face by striking out at the bottom of the page under that heavy line the statement: "Maximum for department, average for department, and minimum for department."

61 Mr. MANN. The key?

Mr. HARDING. That is right; key.

Mr. MANN. Anything under that sub-heading "Key" and the three items?

Mr. HARDING. Yes.

The COURT. Your motion to do so will be granted. Exhibit 13 will stand admitted in evidence as changed by your motion.

Mr. MANN. That is all.

Redirect examination by Mr. HARDING:

Q. Mr. Menck, you said there were six general increases since 1938. You aren't changing the statement, are you, that there have been no general increases in piece rates since 1941?

A. No; I am not changing that statement, since 1941.

Mr. MANN. Mr. Harding, may I state, if you will, that 1941 increase was December 1, 1941, so we have the date on it.

Q. Is that correct, Mr. Menck?

A. The last increase was made on December 1, 1941.

By Mr. HARDING:

Q. A general increase in piece rates?

A. General increase, piece rates and all, was made on December 1, 1941, which is the renewal date of our bargaining agreement.

Q. I see. Then the statement in the contract that the piece rates in effect under the 1940 to '41 contract was not correct; is that it?

A. No; it is not correct as such. It should not be in there as such.

Q. That is a misstatement in the contract?

A. Yes. If you read the '41 contract it admits it is wrong because there is an increase given in the '41 contract.

Q. I see. Now, you say that since you made this speech to the men in which you assured them that piece rates would not be cut, even though earnings skyrocketed, that since that time the earnings of the men have gone up considerably?

A. I made that statement; yes.

Q. About what percentage would you say has been the increase since you made that talk?

62 A. I have no accurate figures. I can only guess at it.

Q. What would be your guess, then?

A. My guess is from 10 to 15 per cent.

Q. I see. And yet in that same time the company has not altered in any way its method of computing overtime purely on the base rate; isn't that correct?

A. No, it has not. We are paying the same.

Q. That is correct, isn't it?

A. That is correct.

Q. Now, what are T. S. jobs?

A. Time study job. "T. S." stands for time study.

Q. I see.

A. They are given out when a job is pretty hard to estimate from a drawing, and rather than set a limit on the job the ticket is marked "T. S." till it gets to the operator and the time study man is sent out to take the time.

Q. Are there T. S. jobs which are not rated?

A. Well, every T. S. job is not rated until a time study is taken.

Q. Well, you mean a T. S. job means a job which has not yet been time studied but which is about to be time studied?

A. That is right.

Q. It is in process of having the rate fixed?

A. Yes.

Q. Established?

A. Every rate cannot be time studied: there is too many jobs going out in the shop, and other rates are estimated on time study of similar jobs. They are compared in the Time Study Department and an estimate is made of what the time should be. That is a regular rate. That goes out as a rate that has been backed up by a time study. Now comes along a job that is fairly hard to estimate, and there are some, and the time study man hasn't got any good comparison: he marks that job "T. S." to indicate the foreman must call a time study man out when the job is run to establish a time on it.

Q. If a man works on that T. S. job he is paid on the basis of his base rate, isn't he?

A. No; not always. Sometimes he is. Let's say there is 40 pieces on the job and we can establish a time on the first two: then he runs the whole job on the piece price. The T. S. is changed to a piece price.

63 Q. Are there a great many T. S. jobs that are not rated?

A. Not a great many.

Q. How do you explain the statement in Plaintiff's Exhibit 14 where you say, "I also know that there are a great number of jobs in the shop which are marked T. S. which have no rate"?

A. That is right.

Q. I thought you said that there weren't a great number of those.

A. It depends on what you call "a great number." You didn't ask me to establish any percentage here.

Q. Well, can you give us a percentage, then?

A. I would rather not, because I may be very inaccurate.

Q. What statement is correct, the statement you made previously or the statement you made in that exhibit? There you say there are a great number of jobs.

A. This exhibit is a reprint of a part of a speech, I didn't know that this would be part of a court record at some later trial. I merely wanted to indicate to our men that if there is a T. S. job out there and they don't get a rate on it, it happens, for instance, there is no time study man available, they can't study the job, all right, he will not suffer on it because we didn't have the price on it. That is merely what I wanted to indicate.

Q. And you indicated there were a great number of those jobs?

A. I used the word "great number." We have 900 jobs out in the shops, let's say a thousand. That is a great number.

Q. Apparently that is a substantial number or you wouldn't have mentioned it to the men?

A. It is not a substantial number. That is not the fact. It is a small number of jobs.

Q. At any rate, there are a certain number of T. S. jobs which are not rated?

A. There are.

Q. And those aren't just dismantling jobs, are they?

A. No; they are new jobs.

Q. Yes. Now, on those the man is paid on the basis of his base rate, isn't he?

Mr. MANN. He said not always.

A. Not always.

64 By Mr. HARDING:

Q. On a job that is not rated, a man is paid on the basis of his base rate, is he not?

A. No.

Q. Well, what is he paid?

A. We may give him an allowance on it.

Q. I mean, the allowance is based on his base rate?

A. No.

Q. What is the allowance based on, then?

A. That may be based on an arbitrary figure the foreman sets; it may be the man's average earning that he has attained over a previous period, or may be a percentage of his piece rate.

Q. Under the contract you say that on jobs that should normally be done on piece work and where the piece rate has not been established the job shall be done on day work for which the piece-

worker shall receive a premium of not less than 20 percent over his base rate?

A. That is right.

Mr. MANN. Mr. Harding——

The COURT. Just a minute. I notice when counsel asks the witness a question you volunteer the answer. Let's just have the witness answer, and then if you want to bring anything out in further examination you can.

Mr. MANN. I would like to object, if the court please. Counsel unintentionally omitted some part of the contract as he read; "where the piece rate has not been established and cannot be estimated."

Mr. HARDING. That is what we are talking about here, as I understand it.

Q. We are talking about a job that hasn't been rated?

A. Yes.

Q. Which means a job that hasn't been time studied or estimated?

A. Yes.

Q. On such a job, isn't it true that the contract ties his compensation to the base rate?

A. Yes, it does.

Q. And he is paid at his base rate plus a certain percentage over, isn't that right, according to the contract?

A. Well, if I, for instance, fix this job and I give him a dollar and a half an hour, I still obey the contract, and I still didn't give him a percentage of his base rate.

65 Q. You are not complying with the contract, then, are you?

A. Why am I not? If you figure on a percentage basis, maybe that figures out to be 50 per cent. I say in the contract I shall not pay them less than 20 percent.

Q. He is assured of receiving 120 percent of his base rate, isn't he?

A. Unless he doesn't perform.

Q. He can get over that, but he is assured of at least 120 per cent of his base rate?

A. With the exception if he doesn't perform we can cancel.

Q. Under that provision where you can cancel if he doesn't perform satisfactorily?

A. Which puts him on the same basis as if he had a regular rate on the job.

Q. Now, Mr. Meinck, I think you stated that the system of paying an overtime premium for hours over 40 a week has been in effect since 1933; isn't that right?

A. Yes.

Q. And there has been no change since that time?

A. No.

Q. No change in the system of computing overtime since 1938?

A. No; not to my knowledge.

The COURT. Exhibit A hasn't as yet been offered.

Mr. MANN. I would like to offer it.

The COURT. It may be received in evidence now so we may refer to it.

(Said document, marked "Defendant's Exhibit A," so offered, was thereupon received in evidence.)

By Mr. HARDING:

Q. Defendant's Exhibit A, Example No. 2, which is an example of how you allocate piece-work earnings on a partnership job, that is, where there is more than one incentive worker working on the same job, I call your attention to that portion of the exhibit, isn't it true that the allocation between the men on the job is based upon each man's base rate?

A. Yes.

Q. Therefore, the significance to those men of their base rate is that it determines the allocation of the piece rate bonus among the men; isn't that correct?

66 Mr. MANN. I think that is argumentative, if the court please.

The COURT. I don't know whether it is or not. Answer it if you can.

A. I can't answer it because whatever answer I give would only be about one-quarter of the facts.

By Mr. HARDING:

Q. Give whatever answer you can.

A. I can't. You are asking me the significance of the base rate to one particular condition only.

Q. That is right. I am only speaking of a partnership job, on a partnership job.

A. The man's base rate is significant, I can make that statement.

Q. It is significant in the allocation of the piece-rate bonus among the men working on the job; is that right?

A. That is correct.

Q. And you said, I believe, that 98 percent of the men—I will phrase it this way: 98 per cent of the time spent by incentive workers is consumed on partnership jobs?

A. That is right.

Q. And it is also true, isn't it, that on most jobs the men make some piece-work bonus?

Mr. MANN. That is shown on the stipulation, of course.

Mr. HARDING. That is shown by the stipulation.

The COURT. Don't cover anything covered in that.

By Mr. HARDING:

Q. So that in most instances the important thing to the man on the job with respect to his base rate is that it determines the allocation of the piece-rate bonus?

Mr. MANN. I object to that as argumentative.

The COURT. Objection sustained.

By Mr. HARDING:

Q. Mr. Mann brought out the point that in the stipulation it states that the month of May 1943 was representative, and you stated that it was a very heavy month. However, is the month of May representative with respect to the ratio between base pay, overtime premium, and piece-work earnings?

A. No.

Q. It is not representative?

A. No.

Q. In what way is it not?

67 A. The piece-work earnings are extremely high in that month.

Q. Well, what is the usual ratio, would you say?

Mr. MANN. What period?

Mr. HARDING. Any period.

A. It is lower than that.

Q. How low? The ratio there is——

A. What do you want; plant averages or group averages or what?

Q. Well, we will say the percentage of the piece-work bonus to base pay. What is the customary percentage?

A. There is no customary percentage. That fluctuates every pay period.

Q. What does it fluctuate between; what figures?

A. It has been in some periods since I have been with the company as low as 5 percent, and May, I think it is 29 percent.

Q. It has been as high as 29 percent?

A. She can go all over the lot.

Q. It fluctuates, you say, between 5 and 29 percent?

A. That is what I recollect right now that I know to be the low. There might be some lower periods.

Q. Aren't you giving us the piece-work earnings to total compensation?

A. No.

Q. You are giving us the ratio between bonus and base pay?

A. That is right. That was your question, wasn't it?

Q. Now, isn't it true in this system of compensating your employees that the more efficient the employees become and therefore the more bonus they make, the greater is the company's profit by virtue of the fact that their overhead per item produced is reduced?

Mr. MANN. Object to that as immaterial and irrelevant.

The COURT. He may answer.

A. May I have that question again?

The COURT. Read it to him again.

(Pending question read by the reporter.)

A. Well, I will answer it this way: It is true in any system the more efficient your men become the better the chances for the company are to make money.

By Mr. HARDING:

Q. Can't you be a little more specific, though? You have a certain amount of overhead per item produced, haven't you?

A. Yes.

Q. Now, the faster that item is made, the lower is the amount of overhead allocated to that item, isn't that right, and therefore your cost per item is reduced?

A. That is correct. That is correct.

Q. Now, I think you said that in normal times the company attempts to keep the overtime hours down to a minimum, whereas since the defense and war effort began the company allows overtime hours to increase; isn't that correct?

A. Yes.

Q. But isn't it true that since the company has permitted overtime hours to increase, the company has made more money than it ever made before?

Mr. MANN. Object to that as immaterial and irrelevant.

The COURT. Objection sustained. Too many other elements in there.

By Mr. HARDING:

Q. What is the relationship between the standard earning rate used in the time studies and the average earned rate of the incentive employees?

A. There is no relationship.

Q. Is one uniformly higher than the other?

A. No. There is absolutely no relationship. There can't be.

Q. You have answered my question, Mr. Menek.

A. Huh?

Q. You have answered my question.

A. I am surprised at the question because——

Mr. HARDING. I don't believe I have offered in evidence Plaintiff's Exhibit 16 for identification.

The COURT. You haven't offered 14 or 15, and I didn't get 16.

Mr. HARDING. I would like to offer in evidence at this time Plaintiff's Exhibits 1 to 16, inclusive.

The COURT. What is 16? I haven't got it.

Mr. MANN. We don't know what it is.

The COURT. Tell me what it is so I can make some notation.

Mr. HARDING. It is the release of the Administrator on
69 effect of bonus payments on computation of regular rate of pay under the Fair Labor Standards Act.

Mr. MANN. If your honor please, we told Mr. Harding we would not object, but we want a statement made on the record it is only a release, of course, and you don't offer it as being binding upon the defendant.

Mr. HARDING. No. I offer it for the purpose simply of showing the Administrator's enforcement policy and the date on which it was issued.

The COURT. It may be received for that purpose.

Exhibits 14 and 15 also are received in evidence. The other exhibits you offered were heretofore received in evidence.

(Said documents, marked "Plaintiff's Exhibit 14, 15, and 16," respectively, so offered, were thereupon received in evidence.)

Mr. HARDING. I ha no further questions.

The COURT. Anything further, Mr. Mann?

Mr. MANN. Nothing further.

The COURT. That is all.

(Witness excused.)

Mr. HARDING. I wonder if I could have about five minutes to get my stuff together.

The COURT. Yes. We will have a ten-minute recess. I have another matter I want to attend to. We will convene about ten minutes after two, or thereabouts.

(Whereupon a recess was taken.)

AFTER RECESS

Mr. HARDING. You honor, I will give you all the Plaintiff's exhibits now.

The COURT. All right.

Mr. MANN. For the defendant there was only one.

Mr. HARDING. This case, of cour , is sort of tried in reverse. We have already argued it and now we come and present the facts.

The COURT. Just briefly touch on anything in the fact situation that you feel bears upon the interpretation the court will have to make. I still think it is pretty much a
70 question of law, and as I indicated to you the other day, I think it is a somewhat close question.

(Argument by Mr. Harding on behalf of the plaintiff.)
(Argument by Mr. Herriott on behalf of the defendant.)
(Argument by Mr. Mann on behalf of the defendant:)
(Rebuttal Argument by Mr. Harding on behalf of the plaintiff.)

The COURT. I have not had the opportunity to go through the exhibits or the stipulation of facts, so the matter will be taken under consideration.

(Which were all the proceedings had and testimony taken in the above entitled matter at said time.)

STATE OF WISCONSIN,
County of Milwaukee, ss:

I, Vera Hancher, assistant official reporter for the District Court of the United States, Eastern District of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings had and testimony taken upon the hearing of the above entitled cause, as contained in my original Stenograph notes taken at said time.

VERA HANCHER, *Reporter.*

71 *Plaintiff's Exhibit No. 13*

HARNISCHFEGER CORPORATION

Chart showing proportion of wages received by a representative group of employees produced by base pay, overtime premium and piece rate bonus, and showing overtime premium which would have been received, had overtime been calculated according to Administrator's interpretation of Section 7 (a).

	Total base pay	Total piece rate bonus	Percentage of bonus to base pay	Total overtime hours	Total overtime premium paid	Approximate overtime earned, plaintiff's contention
Excavator Assembly Dept.:						
1. Stanley Semran	$1,895.28	$503.70	26	263	$125.32	$131.13
2. Edward Beitzel	1,749.13	468.22	27	199	87.64	94.31
3. Nicholas Hepp	1,658.50	142.02	8	264	110.09	101.64
Crane Assembly Dept.:						
4. Carl Quast	2,192.94	716.07	33	602	273.73	325.08
2. Gerald Daugherty	1,956.69	538.21	27	597	237.90	277.60
3. Arthur Hoffman	1,734.77	532.99	30	583	210.38	69
Welding Dept.:						
Alfred Keinhofer	2,764.20	456.83	16	577	325.93	30
2. Harold Danielson	1,564.37	315.50	20	444	155.32	164.28
3. Edward Gamble	2,007.49	218.16	11	420	179.69	183.00
Machinist Dept.:						
1. Rudolph Jergovic	2,616.94	699.92	23	822	388.23	456.21
2. Frank Rugiel	1,561.03	437.36	28	323	172.26	201.35
3. Frank Breit	2,094.62	358.86	17	650	273.56	292.59

Note: The figures are for the year 1941. For detailed figures upon which chart is based, see Plaintiff's Exhibits No. 1 to 12, inclusive.

72 *Plaintiff's Exhibit No. 14*

To Clarify

P. & H. Employees:

To clarify any questions you may have in regard to piece rates, I submit the following section of my speech as given March 16, 1942.

"I herewith will guarantee all now existing rates to stay where they are, regardless of the amount turned in by the men. I also will guarantee that any performance turned in by our men from today on until this war has successfully been won will not be used at any time as a past performance record when and if such rates at later dates should be scrutinized, time-studied, or in some other way adjusted. In order to assure everyone that we mean what we say, we will take all current master cards from which these rates are put onto the labor cards and have them so marked by this production drive committee that there will be no question as to the legitimacy of the transaction.

"It is of such utmost importance that we utilize our machine tools 100% that it becomes everyone's patriotic duty to produce with his machine the most the machine can stand for.

"I also know that there are a great number of jobs in the shop which are marked 'T. S.' and have no rate. From today on, and until this war has successfully been concluded, we will pay to those jobs, instead of the most commonly used 20% over and above day rate, the average hourly earning of the employee. We will establish your average hourly earning every three months and use it for the next three months. We are doing that in the hope that you men will then put in every effort possible while you are operating the machine."

HARNISCHFEGER CORPORATION.
HERMAN MENCK,
Works Manager.

73 *Plaintiff's Exhibit No. 15*

DEC. 4, 1940.

Effective Dec. 2, 1940

The following piece work rate list supersedes and cancels list issued on April 19, 1940 and becomes effective on the above mentioned date.

This list applies to all Depts. in the Shop.

This change will be indicated by (16) on the Master Cards which must be changed to conform with the increased rates after Dec. 1, 1940.

	Symbol	Machine or operation	Rate
	1	Assembly—Tin Shop	80 .78
	2	Assembly—Crane & Trolley	.88
	3	Assembly—Small Excavators	.84
	4	Assembly—Large Excavators	.88
	5	Assembly—Structural	.77
	6	Assembly—Welders & Motors	.88
	7	Assembly—Welder & Motor Repairs	.96
	8	Assembly—Welder & Motor Specialist	.90
	9	Assembly—Miscellaneous Electrical	.86
	10	Assembly—Commutators	.86
	11	Assembly—Excavator Attachment Final	.85
	12	Assembly—Wiring	.88
	13	Bending—Hand—No Setup	.76
	14	Bending—Small Brake—Allow Setup	.76
	15	Bending—Large Brake	DW
	16	Boring Bars—Giddings & Lewis	1.06
	17	Boring Bars—Single Spindle	.92
	18	Boring Bars—Multiple Spindle	.92
	19	Boring Bars—Link	.76
	20	Boring Mills—General	.95
	21	Boring Mills—Cut-Master and 84"	1.00
	22	Brake Band Work & Assembly in Tin Shop	.78
	23	Broaches and Keyseaters	.82
	24	Burning Hand	.83
	25	Burning Machine or Shape	.88
	26	Cleaning & Chipping General & Electrical	.73
	27	Cleaning & Chipping Rough	.68
74	28	Drill Presses—Radial	.82
	29	Drill Presses—Multiple	.82
	30	Drill Presses—Horizontal	.82
	31	Drill Presses—Upright	.76
	32	S-595 and 1308—One man running two machines	.81
		Foundry	DW
	33	Forging—Hammer—3 Men	.88
	34	Forging—Hammer—2 Men	.85
	35	Forging—Machine	
	36	Forging—Hand Anvil Work—2 Men	.90
	37	Grinders—Shaft and Internal	.88
	38	Grinders—Blanchard	.84
	39	Grinders—Bushing	.81
	40	Grinders—O. P.	.74
	41	Grinders—Diamond & Truck Wheel	.81
	42	Gear Cutters and Hobbers	.83
	43	Gear Shapers—Fellows	.87
	44	Lathes—Engine—Heavy Drum (Cl)	1.02
	45	Lathes—Engine—Heavy Drum (Stl)	1.08
	46	Lathes—Engine—Small Drums & Large Work	.97
	47	Lathes—Engine—Special Precision Work	1.00
	48	Lathes—Engine—Second Side Operations	.87
	49	Lathes—Engine—Electrical and Others	.92
	50	Lathes—Bevel Gear	.91
	51	Lathes—Shafting	.92
	52	Lathes—Lodge and Shipley	1.01
	53	Lathes—Bushing	.81
	54	Lathes—Turret—Bushing	1.02
	55	Lathes—Turret—Small	.91
	56	Lathes—Turret—Large—From 2L to 4AL	.95
	57	Lathes—Turret—Large—5L	.99
	58	Lathes—Potter Johnson—1 Man	.95
	59	Layout—Structural	.83
	60	Milling Machines—Ingersoll	1.10
	61	Milling Machines—All except Ingersoll	.87
	62	Milling Structural	.74
	63	Nibbler	.78
	64	Presses—Punch & Notching	.82
	65	Presses—Bushing	.76
75	66	Presses—Forging—1 Man	.92
	67	Presses—Forging—2 Men	.88
	68	Planers—Slotters—Shapers	.92
	69	Punch—Multiple	.86
	70	Punch—1 Man—Tin Shop	.71
	71	Punch—1 Man—Dept. D	.82

Symbol	Machine or operation	Rate
72	Punch—2 Men—Dept. D	$0.74
73	Riveting—Hammer—3 men	.75
74	Riveting—Machine	.74
75	Rivet Making Machine	.82
76	Roll—Tin Shop	.84
77	Roll—Forge Shop—2 Men	.88
78	Roll—Forge Shop—3 Men	.85
79	Sheet Metal Work—General	.87
80	Screw Machine—Hand	.82
81	Screw Machine—[illegible] & J or Acme	.92
82	Straightener—P[illegible]—Chip—Dept. D	.71
83	Slotter Screw	.75
84	Saws—Band	.76
85	Saws—Friction—Structural Shed	.73
86	Saws—Cut Off—Dept. AX	.71
87	Shear—Dept. D	DW
88	Shear—Tin Shop	.76
89	Shear—Rotary	.83
90	Tapping Machine	.76
91	Welding—Bridge Shop—DWL—Intricate	Incentive
92	Welding PWL—XWL—CWL	Incentive
93	Welding—Setup and Tack—PWL—Ordinary	.98
94	Welding—Setup and Tack—PWL—Intricate	1.04
95	Welding—Setup and Tack—Light and heavy DWL—CWL—XWL	Incentive
96	Welding—Setup—Specialist—DWL—TS	Incentive
97	Welding—Spot	.76
98	Welding—Electrical	1.02
99	Winding—Stators, Etc	.68
100	Winding—Coils & Misc	.58

R. P. SANT.

76 *Plaintiff's Exhibit No. 16*

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
WASHINGTON

The Effects of Bonus Payments on Computation of Regular Rate of Pay Under the Fair Labor Standards Act

Section 7 (a) (3) of the Fair Labor Standards Act requires than an employee who works more than 40 hours in a workweek receive compensation for employment in excess of that number of hours "at a rate not less than one and one-half times the regular rate at which he is employed."

The term "regular rate" as used in the Fair Labor Standards Act is a term which is used in contradistinction to overtime rate of pay. Moreover, in view of the fact that extra compensation for overtime work over 40 hours per week is based on the "regular rate," it is necessary to translate an employee's regular compensation into its equivalent hourly rate. The regular hourly rate of pay is, therefore, the total amount of straight time compensation which an employee earns or is paid for an hour of work.

The regular hourly rate of pay is arrived at, in various cases, as follows:

1. Where there is an hourly rate of pay it is such rate or;
2. Where earnings are based on piece work it is the average hourly amount earned during a workweek.
3. Where there is a fixed weekly wage or salary for a fixed number of hours worked per week, it is that sum which, multiplied by the fixed number of hours, will produce such weekly wage or salary.
4. Where there is a fixed weekly wage or salary but the workweek is irregular and fluctuates as to hours, it is that sum which will produce the weekly wage or salary when multiplied by the hours actually worked in any workweek.

Where it can be conclusively demonstrated that a particular payment is a gift or gratuity, it need not be included in computations of the regular rate of pay. In this respect, it should be noted that, if the employee has a right by contract, express
77 or implied, to a payment, it cannot be considered to be a gift. On numerous occasions the Wage and Hour Division has been asked for an opinion as to whether "bonus" payments which are not in the nature of gifts or gratuities should be included in computations of an employee's regular rate of pay. In such instances the term "bonus" is used generally to describe various methods of deferred payment for work done. The statement which follows represents the positions of the Wage and Hour Division on the inclusion or exclusion of such "bonus" payments from computations of regular rate of pay.

It should be pointed out that this interpretation is not binding upon the courts but indicates the construction of the Act which will guide the Wage and Hour Division in the performance of administrative duties unless directed otherwise by the authoritative ruling of the courts.

There are two general categories in which bonus plans fall:

A. In bonus plans of the first category, the payment and the amount of the bonus are solely in the discretion of the employer. The sum, if any, is determined by him. The employee has no contract right, express or implied, to any amount. This type of bonus is illustrated by the employer who pays his employees a share of the profits of his business or a lump sum at Christmas time without having previously promised, agreed or arranged to pay such bonus. In such case, the employer determines that a bonus is to be paid and also sets the amount to be paid.

Bonus payments of this type will not be considered a part of the regular rate at which an employee is employed, and need not be included in computing his regular hourly rate of pay and overtime compensation.

B. In bonus plans of the second category the employer promises, agrees or arranges to pay a bonus. The amount to be paid may be

fixed or may be ascertainable by the application of a formula. An example of this type of plan is a production bonus based on the excess over a minimum quota which the individual, the group, or the plant produces in a period of time. Closely akin is a bonus which is paid for performing work in less than an established standard time and also a bonus which is paid when certain types of merchandise are sold through an employee's efforts. Other kinds of bonuses falling within this group are bonuses
78 distributed in a certain amount or on the basis of a fixed percentage of the profits of the employer or of his gross or net income. There are many variations and refinements of plans within this category. For example, the amount of the payment may vary according to the length of service of the employee, his production or compensation; the earnings, production or compensation of the group of employees with which he works; the sales or net or gross income of the employer; or it may be contingent upon his continuing in the employ of the employer until the time the payment is to be made.

Bonus payments of this type will be considered a part of the regular rate at which an employee is employed, and must be included in computing his regular hourly rate of pay and overtime compensation. No difficulty arises in computing overtime compensation if the bonus covers only one pay period. Under any bonus plan, however, calculation of the bonus may necessarily be deferred over a period of time longer than a work-week. In such a case the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained. Until that is done he may pay compensation for overtime at one and one-half times the compensation paid the employee, exclusive of the bonus. When the amount can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned. The employee must then receive an additional amount of compensation for each week that he worked overtime during the period equal to one-half the hourly rate of pay allocable to the bonus for that week multiplied by the number of overtime hours worked during the week. If it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted. For example, it may be assumed that the employee earned an equal amount of bonus each hour of the pay period and additional compensation for overtime may be computed by multiplying the total number of overtime hours worked during the period by one-half the hourly rate of pay allocable to each hour of the pay period.

In some instances the contract for the payment of a bonus in category B may also provide for a simultaneous payment
79 of overtime compensation on the bonus. In such instances, of course, it is not necessary that overtime be paid on overtime,[1] and payments according to the contract will satisfy in full the overtime provisions of the Act. For example, a contract made prior to the performance of services may provide for the payment of additional compensation in the way of a bonus at the rate of 10 percent of the employee's straight time earnings, and 10 percent of his overtime earnings.

It must be emphasized that the foregoing discussion concerns true bonuses and not schemes employed for the evasion of overtime provisions of the Act. A typical example of such a scheme involving the use of a payment called a "bonus" is the situation in which, in order to insure to employees who are carried on the books as hourly rate workers a certain minimum salary which may be the same as they were receiving prior to the Act, an employer may guarantee a payment based on the difference between the amount they actually earn on the so-called hourly basic and the guaranteed salary. Regardless of the name given to such a payment it is not in fact a "bonus." The hourly rate of pay in this situation is merely fictitious because the employees are in reality salaried employees. The actual rate of pay is determined by dividing the total amount paid by the number of hours worked in the workweek.

The Wage and Hour Division will closely scrutinize each "bonus" payment to ascertain:

1. Whether it is a true bonus or an evasion of the overtime provisions of the Act, and

2. If a true bonus, whether the payment is a part of the employee's regulate rate of pay.

80 *Defendant's Exhibit No. A*

In these examples the "defense wage adjustment" is included in base rate, and overtime premium is 50% of the base rate.

1. When only one man works on an incentive job—

Piece work price for job	$ 10.00	$10.70
It takes 10 hours to complete job.		
Base rate is 70¢ per hour (70¢ x 10)	7.00	
Piece work earnings	3.00	
Man has 2 hours overtime premium (35¢ x 2)	.70	.70
Total amount received for job		10.70

[1] See paragraph 13 of Interpretative Bulletin No. 4.

2. When a man works "partnership" with one or more persons on an incentive job—

Piece work price for job		$120.00 $120.00
Three men work on job:		
Man "A"—64¢ base rate—works 25 hours	$16.00	
Man "B"—64¢ base rate—works 50 hours	32.00	
Man "C"—$1.00 base rate—works 48 hours	48.00	
Total hours worked—123—at base rates		96.00
Total piece work earnings		24.00

This $24.00 is distributed in the ratio of base rate pay as follows:

"A" gets $\frac{16 \times 24}{96} = \$4.00$

"B" gets $\frac{32 \times 24}{96} = 8.00$

"C" gets $\frac{48 \times 24}{96} = 12.00$

Man "A" has 5 hours overtime premium (5 x 32¢)	1.60	
Man "B" has 3 hours overtime premium (3 x 32¢)	.96	
Man "C" has 8 hours overtime premium (8 x 50¢)	4.00	
Total overtime premium		6.56
Amount received for the job		126.56

81 3. Illustrating "excess labor" on an incentive job—

Piece work prices for job		90.00 90.00
3 men work on the job:		
Man "A"—64¢ base rate works 25 hours	16.00	
Man "B"—64¢ base rate—works 50 hours	32.00	
hours	32.00	
Man "C"—$1.00 base rate—works 48 hours	48.00	
Total hours worked—123 at base rate	96.00	
Amount received for the job		96.00
There are no incentive earnings, but due to base rate under contract there is an "excess labor" cost of		6.00

In the District Court of the United States

[Caption—1087]

(Filed Dec. 31, 1943)

Opinion

The question for decision in this case involves an interpretation of the overtime section of the Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 201, et seq.). More particularly, a determination must be made as to the meaning of "regular rate" in Sec. 7 (a) of the act (29 U. S. C. A., Sec. 207 (a)), which provides that an employee shall receive compensation for work in excess of specified hours "at a rate not less than one and one-half times the regular rate at which he is employed." As a result of collective bargaining between defendant and the union which is the collective bargaining agent for defendant's employees, a contract was executed on December 9, 1942, superseding previous collective bargaining agreements. The contract classifies production employees into two groups called incentive and nonincentive workers, and provides for a basic hourly rate of pay for each of these types of workers. It also includes a provision for a defense wage adjustment and a bonus, both of which are applicable to each group.

Defendant's incentive or piece-rate system operates in the following manner: The various jobs performed by incentive workers are time studied by the management. The time which the job is shown to consume is multiplied by a "standard earning rate." The amount so computed becomes the "price" placed on that job.
82 Thereafter when an employee is given work on a job which has been priced, he receives a job card bearing that price. The incentive to perform his job speedily and efficiently is held out to the worker, for he will then receive in compensation the price on the job and not merely his base rate of pay, assuming that he performs the work in less than the schedule time shown in the time study. Both employer and employee profit, the latter by earning piece rate compensation over and above his base rate, and the employer by increased production. The union contract contains provisions for correcting piece rates which turn out to be too high or too low. The testimony shows that an incentive worker averages between 10% and 35% over his base rate.

Section 3 (e) of the contract provides: "* * * for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed, is the base rate of each such employee. * * *" Section 4 (a) of the contract provides: "The Company will operate all shop departments on a basic eight

(8) hour day and forty (40) hour week with time and one-half, computed for incentive workers on their base rate as heretofore defined in Section 3, paragraph (e). * * *"

Approximately 50% of defendant's production employees are incentive workers. On each pay day about 98% of all incentive workers receive some compensation over and above their base rate. In each pay roll for incentive workers, piece-rate bonuses form about 22% of the compensation received by such workers, overtime excluded. These workers are paid overtime at one and one-half times their base rate. Plaintiff here contends that irrespective of the wording of the contract, the incentive employees of the defendant are entitled to overtime computed on their base rate plus their piece-rate earnings.

Defendant contends that the contract in question is valid as it provides a specified wage in excess of the minimum required by the act, and contains a provision for payment of time and one-half for overtime. Defendant points to the language of the Supreme Court in Walling v. Belo Corp., 316 U. S. 624, 631:

"* * * But it is agreed that as a matter of law, employer and employee may establish the 'regular rate' by contract. * * *"

Defendant argues that the provision of the contract in
83 question, is designating the "base rate" as the regular rate," as hereinabove quoted, falls squarely within that language.

This court has heretofore stated in Walling v. L. J. Mueller Furnace Co., 50 F. Supp. 561, 562, that the Belo case "was a five to four decision, and its doctrine should not be extended beyond the facts in that case." The Belo case involved salaried employees whose hours of work fluctuated widely and who were desirous of working out a plan with their employer which guaranteed them a certain weekly salary. Since the Belo decision, several courts have held that any plan which lacks the element of a guarantee of a weekly wage does not fall within the scope of that decision. Walling v. Green Head Bit and Supply Co., 10 Cir., 138 F. (2d) 455; Walling v. Livernois, 50 F. Supp. 978; Scott v. Atlas Press Co., 49 F. Supp. 260.

Wages computed as a result of piece work are just as much a part of the regular compensation, and the employees have just as much right to the same, when earned, as they do to wages when computed on base rates. The language of the court in Walling v. Stone, 7 Cir. 131 F. (2d) 461, 464, well describes the situation as to defendant's incentive workers. It was there said that the "accurate way of describing defendants' system of compensation is as a piece rate system with a minimum hourly guaranty."

The sentence which defendant has quoted from the opinion in the Belo case does seem to give some basis for its contention

that even though the court find the "regular rate" of wages to be one thing, the parties by contract may make some other basis the regular rate, by merely labeling it as such. I do not believe, however, that such an interpretation is warranted. The language on which defendant relies was not necessary to the Belo decision and I am convinced that the court did not intend to convey the idea that after the parties had worked out and agreed upon the compensation to be paid, they could then agree what the "regular rate" would be for overtime purposes.

It is my conclusion that judgment must go for the plaintiff.

Dated at Milwaukee, Wisconsin, this 31st day of December A. D. 1943.

(Signed) F. RYAN DUFFY, *Judge.*

Endorsed: "Filed Dec. 31, 1943. B. H. Westfahl, Clerk."

84 In the District Court of the United States

[Caption—1087]

(Filed Feb. 5, 1944)

Findings of fact and conclusions of law

The Court finds that:

I

This is a suit brought by the Administrator of the Wage and Hour Division, United States Department of Labor, to restrain violations of Sections 15 (a) (1) and 15 (a) (2) of the Fair Labor Standards Act of 1938, hereinafter called the Act.

The defendant, Harnischfeger Corporation, is a Wisconsin corporation, having its principal office, place of business, and a manufacturing plant in the Village of West Milwaukee, Wisconsin, within the jurisdiction of this Court.

II

The defendant is, and has been since a date prior to October 24, 1938, engaged in the manufacture, production, sale and distribution of electric cranes, hoists, motors, welders, power excavating machines, welding electrodes, housing panels and other heavy metal products, for shipment to points both in and out of the State of Wisconsin.

During the period since October 24, 1938, the defendant has employed and is employing approximately four thousand (4,000) employees in and about its plant in the Village of West Mil-

waukee, Milwaukee County, Wisconsin, in the production of the said metal products, hereinabove described, and in processes and occupations necessary thereto. Substantial quantities of the goods produced by the said employees in said plant have been, and are being produced for interstate commerce, and have been, and are being sold, transported, shipped and delivered in interstate commerce from the said plant in the State of Wisconsin to, into and through states other than the State of Wisconsin.

85

III

On December 9, 1942, defendant and the union representing the employees, entered into an employment contract, which contract is representative of the agreements as to the methods of compensation in effect since October 24, 1938, to the present date. The contract classifies production employees into two groups called incentive and non-incentive workers, and provides for a basic hourly rate of pay for each of the two types of workers. The contract also includes a provision for a defense wage adjustment and a bonus for work performed on the second and third shifts. Both the defense wage adjustment and the bonus apply to the incentive and non-incentive workers and are considered as part of the base rate of pay by the defendant in computing overtime pay.

IV

Section 3 (e) of the employment contract provides; "* * * for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed, is the base rate of each such employee * * *." Section 4 (a) of the contract provides; "The company will operate all shop departments on a basic eight (8) hour day and forty (40) hour week, with time and one-half, computed for incentive workers on their base rate as heretofore defined in Section 3, paragraph (e) * * *."

As to the incentive workers, the Harnischfeger Corporation paid time and one-half on the base rate, but not time and one-half on the average hourly earnings for hours worked in excess of the maximum number provided by Section 7 (a) of the Act.

V

Approximately 1250 or 50 percent of the production employees of the Harnischfeger Corporation are incentive workers. Each incentive worker is given a basic hourly rate, but also works on a piece-rate or incentive system. The various jobs performed by the incentive workers are time studied by the management. The time

which the job is shown to consume is multiplied by a
86 "standard earning rate," and the amount so obtained is known as the "price" placed on that job. The "standard earning rate" is the hourly rate of pay which workers in the Milwaukee district receive for that type of work. This "standard earning rate" is not the base rate of any worker in the Harnischfeger plant, nor is it the average hourly earned rate of any worker. When an employee is given work on a job which has been priced in the manner described, he receives a job card bearing the price. By dividing the job price by this base rate, the worker knows the amount of time in which he must complete the job if he is to receive anything over and above his base rate of pay.

VI

The incentive to perform his job speedily and efficiently is held out to the worker, for he will then receive in compensation the price on the job and not merely his base rate of pay, assuming that he performs the work in less than the scheduled time shown in the time-study. Under this system both employer and employee profit, the latter by earning piece rate compensation over and above his base rate, and the employer by increased production.

VII

There are a great number of jobs which have not been time studied by the company. According to the union contract the Harnischfeger Corporation agrees to pay each incentive worker who performs work on such a job not less than 20 percent over his base rate. The union contract also contains provisions for correcting piece rates which turn out to be too high or too low. In each case whether a correction is warranted is determined by a comparison of the employee's earnings on a particular job with his average hourly earned rate. In case an employee has a justifiable grievance the company may be compelled to restudy the job and establish a higher piece rate. In case the earnings exceed 20 percent over the standard earning rates the company reserves the right to correct the piece rates. In this manner, piece rates are geared to permit a man to make his usual earned rate, which averages between 10 and 25 per cent over his base rate.

87 VIII

On each pay day, about 98½ percent of all incentive workers receive some compensation over and above their base rates. In each pay roll for incentive workers piece rate bonuses form about 22 percent of the total compensation received by the workers, all

overtime payments excluded. On certain jobs, piece rate earnings fall short of base rates and the difference is called "excess labor" by the company. For the month of May 1943 excess labor amounted to approximately $5,600.00, whereas piece rate earnings (over and above base rates) amounted to about $86,430.00.

IX

During the period from October 24, 1938, to the date hereof incentive or piece workers frequently worked in excess of the maximum number of hours per week provided by Section 7 (a) of the Act. The workers have been paid overtime at one and one-half times their base rate only. This is true even in the case where the employee is working on a job which has not been time studied as described in Finding No. VII. The incentive worker's piece rate earnings, over and above his base rate, have never been included with the base rate of pay in computing overtime compensation for incentive workers.

X

During the period from October 24, 1938, to the date hereof, defendant has transported, offered for transportation, shipped, delivered and sold in interstate commerce, and shipped, delivered, and sold with knowledge that shipment, delivery, and sale thereof in interstate commerce was intended, goods produced by its said employees, certain of whom have been paid and compensated as stated in Finding No. IX.

88 Conclusions of Law

I

The Court has jurisdiction of the parties and of the subject matter of this cause.

II

The plaintiff is authorized to bring and maintain this action by Section 11 (a) of the Act.

III

Since October 24, 1938, the defendant's employees engaged at the defendant's plant in West Milwaukee, Wisconsin, have been engaged in interstate commerce, or the production of goods for interstate Commerce, and are entitled to the benefits of the Act.

IV

From October 24, 1938, to the date hereof the defendant's incentive or piece-rate employees have not been paid overtime

compensation in accordance with Section 7 (a) of the Act. Such employees should have received, for all overtime hours worked, at least one and one-half times their average hourly earned rate rather than one and one-half times their hourly base rate.

V

The plaintiff has shown cause within the meaning of Section 17 of the Act for the issuance of an injunction restraining the defendant from violating the provisions of Sections 15 (a) (1) and 15 (a) (2) of the Act.

Enter:

F. RYAN DUFFY,
United States District Judge.

Dated: Feb. 5, 1944.

[Endorsed: "Filed Feb. 5, 1944. B. H. Westfall, Clerk."]

89 And afterwards, to wit: on the thirtieth day of said Term, to wit: on the 5th day of February A. D. 1944, the following proceedings were had, to wit:

In the District Court of the United States

[Caption—1087]

Judgment

The above-entitled action being at issue and coming on for trial before the Court, and the Court having heard and considered the evidence submitted by the parties, and having read and considered the briefs of the respective parties, and having made and entered Findings of Fact and Conclusions of Law, and sufficient reason therefore appearing, it is, therefore, upon motion of the attorney for the plaintiff, and for cause shown:

Ordered, adjudged, and decreed that the defendant, Harnischfeger Corporation, a corporation, its agents, servants, employees, attorneys, and all persons acting or claiming to act in its behalf and interest, be and they hereby are, permanently enjoined and restrained from violating the provisions of Section 15 (a) (1) and 15 (a) (2) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 et seq.), hereinafter referred to as the Act, in any of the following manners:

1. The defendant shall not, contrary to Section 7 of the Act, employ any of its employees engaged in commerce or in the production of goods for commerce, as defined by the Act, for a work-

week longer than 40 hours, unless the employee receives compensation for his employment in excess of 40 hours at a rate not less than one and one-half times the regular rate at which he is employed.

2. The defendant shall not, contrary to Section 15 (a) (1) of the Act, ship, deliver, transport, offer for transportation, or sell in interstate commerce, as defined by the Act, or ship, deliver, or sell with knowledge that shipment, delivery, or sale thereof in interstate commerce is intended, any goods in the production of which any employee of the defendant has been employed at rates of pay less than those specified in Paragraph 1 of this judgment.

3. Without prejudice to the right of any person, this
90 judgment shall not be enforceable by contempt proceedings until after final determination upon appeal by the United States Circuit Court of Appeals for the Seventh Circuit or the United States Supreme Court if it takes jurisdiction of this matter, provided an appeal is taken within thirty days from the date hereof.

It is further Ordered, adjudged and decreed that the plaintiff have judgment for costs against the defendant as taxed by the Clerk of this Court in the amount of $_____.

Dated Feb. 5, 1944.

Enter;

F. RYAN DUFFY,
United States District Judge.

[Endorsed: "Filed Feb. 5, 1944. B. H. Westfahl, Clerk."]

In the District Court of the United States for the Eastern District of Wisconsin

Civil Action. File No. 1087

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

vs.

HARNISCHFEGER CORPORATION, A CORPORATION, DEFENDANT

Notice of appeal and cost bond

(Filed Feb. 24, 1944)

Notice is hereby given that Harnischfeger Corporation, a corporation, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit, Eastern

Division, from the whole of the final judgment entered in this action on the 5th day of February 1944.

LOUIS QUARLES,
LEO MANN,
MAXWELL H. HERRIOTT,
Attorneys for Appellant, Harnischfeger Corporation, Address: 411 East Mason Street, Milwaukee 2, Wisconsin.

FEBRUARY 24, 1944.

91 In the District Court of the United States

[Caption—1087]

Statement of points

Now comes Harnischfeger Corporation, by Maxwell H. Herriott, one of its attorneys, and files for inclusion in the record on this appeal this its Statement of Points, being the errors asserted and intended to be urged:

1. The rejection as unlawful of the contract of employment entered into between the Harnischfeger Corporation, as employer, and the Steel Workers Organizing Committee, Local Union #1114, as the duly established collective bargaining agent for the employees, wherein they expressly agreed that the "base rate" of pay, which exceeded the minimum rate of pay required by the Fair Labor Standards Act of 1938, was for all purposes the regular rate of pay, and by which contract the employer agreed to pay, and the Court found that the employer in fact did pay, one and one-half times said "agreed regular rate of pay" for all hours in excess of the maximum specified by said Fair Labor Standards Act of 1938.

2. The entry of the Judgment, from which this appeal is taken, because the facts found do not support the Conclusions of Law numbered IV and V pursuant to which said Judgment was entered, said Conclusions of Law being as follows:

"IV

From October 24, 1938, to the date hereof the defendant's incentive or piece-rate employees, have not been paid overtime compensation in accordance with Section 7 (a) of the Act. Such employees should have received, for all overtime hours worked, at least one and one-half times their average hourly earned rate rather than one and one-half times their hourly base rate.

V

The plaintiff has shown cause within the meaning of Section 17 of the Act for the issuance of an injunction restraining the defendant from violating the provisions of Sections 15 (a) (1) and 15 (a) (2) of the Act."

Respectfully submitted.

MAXWELL H. HERRIOTT,
Maxwell H. Herriott,
Attorney for the Defendant.

MARCH 23, 1944.

[Endorsed: "Filed Mar. 23, 1944. B. H. Westfahl, Clerk."]

Know All Men By These Presents, that United States Fidelity & Guaranty Company, a surety company, licensed to do business in the State of Wisconsin, is held and firmly bound unto L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, appellee in the above cause, in the sum of Two hundred and Fifty dollars ($250.00), lawful money of the United States, to be paid to the said L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, his successors and assigns, to which payment well and truly to be made it binds itself by these presents.

Sealed with its seal and dated this 24th day of February A. D. 1944.

Whereas, Harnischfeger Corporation, a corporation, has filed an appeal in the United States Circuit Court of Appeals for the Seventh Circuit to reverse the judgment of the District Court of the United States for the Eastern District of Wisconsin, dated the 5th day of February A. D. 1944, Civil Action No. 1087.

Now, Therefore, the condition of this obligation is such that if the said Harnischfeger Corporation shall prosecute its appeal with effect and pay all costs if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By THOS. G. EGAN, [SEAL]
Attorney in fact.

In the presence of
CARL G. GEZELSCHAP.

[Endorsed: Filed Feb. 24, 1944. B. H. Westfahl, Clerk.]

93 In the District Court of the United States

[Caption—1087]

Statement of appellee

Notice is hereby given that L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff in the above-named action, is the appellee in an appeal taken by Harnischfeger Corporation, defendant named above, notice of said appeal having been served on the Clerk of the District Court for the Eastern District of Wisconsin, on February 24, 1944, The names and addresses of the attorneys for appellee are as follows: Douglas B. Maggs, Solicitor, Office of the Solicitor, United States Department of Labor, Washington 25, D. C. Bessie Margolin, Assistant Solicitor, Office of the Solicitor, United States Department of Labor, Washington 25, D. C. Kenneth P. Montgomery, Regional Attorney, Office of the Solicitor, United States Department of Labor, 222 West North Bank Drive, Chicago 54, Illinois.

DOUGLAS B. MAGGS,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
KENNETH P. MONTGOMERY,
Regional Attorney,
Attorneys for Appellee, L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor.

[Endorsed: Filed Feb. 26, 1944. B. H. Westfahl, Clerk.]

94 In the District Court of the United States

[Caption—1087]

Stipulated exhibits on appeal

It is hereby stipulated by and between the parties to the above-entitled action by their respective attorneys that, with the approval of the District Court, the originals of plaintiff's exhibits 1 to 12, inclusive, may be submitted to the Circuit Court of Ap-

peals as a part of the appellate record without having them placed in the printed record.

Dated March 22nd, 1944.

DOUGLAS B. MAGGS,
Douglas B. Maggs,
Solicitor,

ARCHIBALD COX,
Archibald Cox,
Associate Solicitor,

BESSIE MARGOLIN,
Bessie Margolin,
Assistant Solicitor,

KENNETH P. MONTGOMERY,
Kenneth P. Montgomery,
Regional Attorney,
Attorneys for Plaintiff.

MAXWELL H. HERRIOTT,
Attorney for Defendant.

In the District Court of the United States

[Caption—1087]

Stipulated of designation of record on appeal

It is hereby stipulated by and between the parties to the above-entitled action, by their respective attorneys, that the Clerk of the United States District Court for the Eastern District of Wisconsin shall transmit as the record on appeal in the above-entitled matter, the following:

1. Plaintiff's complaint.
2. Defendant's answer.
95 3. Defendant's motion to dismiss, exclusive of the copy of the contract attached thereto, which contract is attached to the Stipulation of Facts.
4. Order denying motion to dismiss.
5. Stipulation of Facts and exhibits attached thereto.
6. Transcript of the proceedings of trial, with the following corrections:

On page 21 of the transcript, strike out the last word in the eighth line from the bottom of the page.

On page 41, in the fourth line from the bottom of the page, change "five" to "six."

Said transcript shall be printed in question and answer form.

7. Opinion of the trial judge.

8. Findings of Fact and Conclusions of Law, and Judgment of the trial court.
9. Plaintiff's Exhibits 1 through 16, Inclusive.
10. Defendant's Exhibit A.
11. This Stipulation.

DOUGLAS B. MAGGS,
Douglas B. Maggs,
Solicitor,
ARCHIBALD COX,
Archibald Cox,
Associate Solicitor,
BESSIE MARGOLIN,
Bessie Margolin,
Assistant Solicitor,
KENNETH P. MONTGOMERY,
Kenneth P. Montgomery,
Regional Attorney,
Attorneys for Plaintiff.
MAXWELL H. HERRIOTT,
Attorney for Defendants.

Dated March 22, 1944.

[Endorsed: Filed Mar. 22, 1944. B. H. Westfahl, Clerk.]

96 *Certificate of clerk*

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, B. H. Westfahl, Clerk of the District Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of the pleadings, judgment and other papers in the case of L. Metcalfe Walling, Administrator of the Wage and Hour Division, etc. vs. Harnischfeger Corporation, Civil Action No. 1087.

In testimony whereof, I have hereunto set my hand and duly affixed, the seal of said Court at the city of Milwaukee, in said district, this 27th day of March in the year of our Lord, one thousand nine hundred forty-four, and of the Independence of the United States, the 168th.

[SEAL] B. H. Westfahl, *Clerk.*

97 At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the twenty-eighth day of September, in the

year of our Lord one thousand nine hundred and forty-three and of our Independence, the one hundred and sixty-eighth.

8553

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLEE

vs.

HARNISCHFEGER CORPORATION, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Eastern District of Wisconsin

And on the seventeenth day of November 1944, there was filed in the office of the Clerk of this Court, the Opinion of the Court which said Opinion is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit

No. 8553

October Term and Session, 1944

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLEE

vs.

HARNISCHFEGER CORPORATION, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Eastern District of Wisconsin

November 17, 1944

Before EVANS, MAJOR, and MINTON, Circuit Judges.

EVANS, Circuit Judge. This suit is one to enjoin defendant's alleged violation of the one and one-half overtime provision of the Fair Labor Standards Act. The violations were denied by
98 defendant. The court found for plaintiff and permanently enjoined defendant "from violating the provisions of Sections 15 (a) (1) and 15 (a) (2) of the Fair Labor Standards Act of 1938" in the respects designated. Defendant appealed from this decree.

The facts are free from dispute. There is a mutual concession of good faith between opposing litigants and differences are concededly advanced, honestly. The employees, while not admitting the validity of defendant's contention, are not the complainants. They were represented by the Union, the United Steelworkers of America in all the negotiations. Defendant and its employees are, in other words, in seeming accord over their wage agreement, which they reached amicably and which is the result of their joint successive wage agreement efforts dating back to 1938. In other words, the parties, prior to the passage of the Act in question, began the present incentive wage practice in 1927 and provided for one and a half overtime compensation as far back as 1933.

Generally stated, the controversy is over the correct base upon which defendant must compute its time and a half pay for overtime work. There is no dispute as to the existence or terms of the wage contract which the employees and defendant negotiated. It is in writing and provided for compensations of the employees at a rate higher than the minimum provided for by the Act, and it fixed the hours of service and overtime payments where services exceed the eight-hour day and the forty-hour week.

Differences arise out of the time and a half payment to a group of employees numbering about 1,250 (of the total of 4,000) who are defined as "incentive workers." "Incentive workers" are described as piece workers who are employed under an agreement which fixes an hourly rate ranging from 78¢ to $1.08 per hour and also provided for additional pay in case the worker or workers were able to show results better than the time study schedules for the various products. Nearly all (98½%) of these incentive workers have in each pay-roll period earned more than their basic or fixed wage because they did their work more speedily than the time study calculations set for the particular task. An interesting chart has been submitted, which shows the amount of incentive pay which the incentive wage earners have received because of their ability to turn out work faster than the estimated time fixed for the doing of the task. This chart shows the incentive pay varies from 2¢ to 20¢ an hour over the basic wage schedule. The amount of the incentive pay of any employee is dependent solely upon his skill and industry. The compensation of an incentive worker may be no more than base rate pay—and but for the contract, might be even less.

99 The legal controversy is over the application of time and a half pay to these incentive workers. Plaintiff contends that the overtime computations should be upon the basis of the actual wage paid to the incentive worker including incentive pay. The defendant argues that the basic wage rates fixed in the wage

agreement are the correct bases for computing the time and a half pay.

The controlling statute reads as follows:

SEC. 7 (a)—"No employer shall * * * employ any of his employees * * * for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

What was the "regular rate" at which defendant's incentive workers were employed? This is the question for decision.

The employment contract, here involved, provides:

SEC. 3 (e)—"As agreed to between the Company and the Union in the last two annual collective bargaining sessions, the parties agree that, for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed, is the base rate of each such employee. It is the intention of the Company and the Union that the base rates and piece work rates fixed by this agreement shall remain in effect, and that there shall be no general reductions therefrom during the life of this agreement. However, the Union and the Company recognize that, should adverse economic conditions arise, it may be desirable and necessary, in the interest of employees' security of employment and earnings and the Company's future welfare, to modify the rates hereby established before or at the expiration of this agreement, and it is, therefore, agreed that, should the Company in good faith request such a modification of rates during the life of this agreement, the Union will in good faith enter into collective bargaining negotiations on that request. In consideration thereof the Company agrees that it will not seek such a modification unless the total shop productive hours fall below One Hundred Thirty Thousand (130,000) per month for Three (3) successive months."

The decision in Walling v. Belo Corp., 316 U. S. 624, controls the disposition of this appeal. The Belo case and Overnight Motor Co. v. Missel, 316 U. S. 572, were decided the same day. Neither represents the unanimous opinion of the Court. We must assume the majority of the Court found the two opinions were entirely reconcilable.

We see no good reason for not accepting the pronouncement of principle appearing in the Belo opinion and applying it here, even though the facts in that case differ from the one before us. The heart of the decision in the Belo case is to be found in the statement, "It is agreed that as a matter of law the employer and employee may establish the 'regular rate' by contract."

Nor can we ignore the philosophy back of the final conclusion, which is expressed, thus:

"The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably, Congress refrained from attempting such definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours. Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected. This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day.

Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance. Congress has said nothing to prevent this desirable objective. This Court should not."

Recently decided (November 6, 1944) by the Supreme Court, is the case of Walling, Administrator vs. Helmerich & Payne, Inc., and the opinion there announced sheds further light on the proper application of the overtime wage rate provision of Section 7 (a) of the Fair Labor Standards Act of 1938.

As in the Belo case, the Court affirmatively stated what the Act contemplated. We quote from the opinion:

"The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiation between employer and employee, provided that the statutory minimum is respected."

The opinion is largely devoted to showing that the rates fixed in that case were not reached in a bona fide manner. It held that the statute may not be avoided by an adoption of unrealistic and artificial methods of computing the regular rate. The Court says, "The freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purpose." Then, too, it
101 points out that in the contract before the court the parties so expressed themselves that the employee was not paid,

time and a half his regular hourly rate, when he worked in excess of forty hours a week. Only when he worked beyond eighty hours did he receive overtime payment.

The Court there concludes:

"Nothing in this Court's decision in Walling v. Belo Corp., supra, sanctions the use of the split-day plan. The controversy there centered about the question whether the regular rate should be computed from the guaranteed weekly wage or whether it should be identical with the hourly rate set forth in the employment contract. There was no question, as here, pertaining to the applicability of the regular rate to the first 40 hours actually and regularly worked, with the overtime rate applying to all hours worked in excess thereof."

Clearly, the Helmerich case is distinguishable from our case so far as the facts are concerned. The Court indirectly reaffirmed the quoted language in the Belo case.

From our study of the two decisions we conclude:

(a) The employer and employee may (and it is contemplated they should) negotiate and agree by contract upon "the regular rate" of compensation. Provided, however, in so doing they act in good faith and respect the minimum of wages and the minimum hours of services fixed by the statue. (We have in the instant case an agreement between the parties where the regular rate of pay is settled and set forth in a written contract.) Also there was present the utmost good faith.

(b) The contract negotiated in our case respected the statutory minimum both as to the compensation and the hours of work. As to this requirement there is no controversy.

(c) The overtime payments in excess of the statutory minimum of hours is covered and the one and a half pay is based upon the regular wage.

If the wage agreement in this case did not settle the regular rate in a bona fide manner through negotiation and did not respect the statutory minimum provisions, we are at loss to know how the parties may cover the subject by agreement.

Also present is the query—if the parties by inserting a definition of a "regular rate" in their wage agreement did not intend to fix said "regular rate" as a basis for the time and a half computation, what was their purpose in inserting it at all?

There would seem to be good reason for providing as the parties agreed, that the regular rate should be the hourly rate (ranging from 58¢ to $1.08 an hour) rather than said hourly rate plus an unknown and undeterminable addition as incentive compensation. The incentive compensation varied. It was not known. It varied not only in different months but was different with different

102 employees and different products. The addition due to incentive pay was as low as 2¢ and as high as 29¢ per hour. The employer and employee evidently wished to provide that overtime payments be paid promptly and at the same time as the payment of the regular wages. They therefore defined regular wage and left therefrom the incentive wage, the determination of which was unknown and unfixed sometimes for weeks and even months.

There is only one question before us: What was the regular rate of pay? The employer and employees have, as they had a right to do, answered that question for us. They have incorporated their agreement in writing. They acted in good faith. They agreed upon the regular rate of pay, and their regular rate respected the minimum requirement provisions fixed in the statute. We must therefore accept their agreement.

The decree is reversed with directions to dismiss the complaint.

MINTON, Circuit Judge, Dissenting. I am unable to agree with the majority's opinion. I cannot agree that the Belo case is authority for the bold proposition that, where the "regular rate" of pay is defined by contract, that definition is controlling, if the contract is made in good faith and the rate specified is above the minimum of the Wages and Hours Act. True, the Belo case, 346 U. S. 624, 630, 62 S. Ct. 1223, 86 L. Ed. 1716, said:

"* * * But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act."

This language has been quoted with approval in Bergschneider v. Peabody Coal Co., 142 F. 2d 784, 786; Murray v. Noblesville Milling Co., 131 F. 2d 470, 474; General Mills, Inc. v. Williams, 132 F. 2d 367, 370; and White v. Witwer Grocery Co., 132 F. 2d 108, 111. Similarly, see Shepler v. Crucible Fuel Co., 140 F. 2d 371. In these cases, the contract set forth a mathematical formula to be applied to the contract "regular rate" to give a round figure, which was the approximate amount actually paid the employee. The computation was done solely for the purpose of enabling the employer to pay the same wages per pay period which he had been paying before the Act went into effect.

In the case at bar, the "regular rate" is likewise defined in the contract, but in practice it is not the rate at which 98½% of the incentive workers are paid. There is no relationship between the "regular rate" and the amounts actually paid per hour. The only purpose of this contract is to enable the company to continue its

piecework pay schedule without interference by the Wages and Hours law. In this respect again, the situation differs from
103 the Belo case. In that case, the contract called for a minimum guarantee to each employee of $40 per week. As its opinion shows, the Supreme Court considered that provision very beneficial to the employees in view of the irregular hours worked and the employees' desire for security. In our case, we have only a minimum hourly guarantee but no weekly guarantee, and since there is no requirement that any minimum number of hours per week be worked, this persuasive aspect of the Belo case is absent. Walling v. Ilivernois, 50 F. Supp. 978.

The contract may define a certain "regular rate," but if the men actually work under, and are paid at, a different rate, it seems to me the latter is the "regular rate." It is the realities of the situation that control and not the unapplied terms of a contract. The Supreme Court has said as much in the recent case of Walling v. Melmerich & Payne, Inc., decided November 6, 1944, 9 Labor Cases ¶ 51,183. In that case the court said:

"It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act."

Because I believe that the "regular rate" fixed by the contract is not the one actually used, and that the "regular rate" is to be determined by what the parties do and not by what they contract to do, I would affirm the judgment of the District Court.

A true copy:

Teste:

And on the same day, to wit: On the Seventeenth day of November 1944, the following further proceedings were had and entered of record, to wit:

Friday, November 17, 1944

Court met pursuant to adjournment.

Before Hon. EVAN A. EVANS, Circuit Judge; Hon. J. EARL MAJOR, Circuit Judge; Hon. SHERMAN MINTON, Circuit Judge.

104 8553

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLEE

vs.

HARNISCHFEGER CORPORATION, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Eastern District of Wisconsin

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said District Court with directions to dismiss the compl int.

United States Circuit Court of Appeals for the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of the Opinion, filed November 17, 1944, and Judgment entered on the same day, in: Cause No. 8553, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff-Appellee vs. Harnischfeger Corporation, Defendant-Appellant, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this first day of February A. D. 1945.

[SEAL]

KENNETH J. CARRICK,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

105 Supreme Court of the United States

No. 956, October Term, 1944

Order allowing certiorari

Filed April 2, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1945

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No. 956

In the Supreme Court of the United States

OCTOBER TERM, 1944

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HARNISCHFEGER CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

HARNISCHFEGER CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above case on November 17, 1943.

OPINIONS BELOW

The opinion of the District Court (R. 81) is reported 54 F. Supp. 326. The opinions of the Circuit Court of Appeals (R. 97–103) are not yet reported.

631365—45——1

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 17, 1944 (R. 104). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the payment of overtime at one and one-half times a rate labelled by contract as the "regular rate" of pay meets the requirements of Section 7 of the Fair Labor Standards Act despite the fact that the contract rate is not the actual rate of pay but excludes piece work "incentive" payments earned by approximately 98½ per cent of the employes involved, amounting to about 22 per cent of their earnings exclusive of overtime.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * * *
>
> (3) for a workweek longer than forty hours after the expiration of the second year from * * * [the effective] date [of this section],

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

The facts are adequately set forth in the findings of fact and conclusions of law entered by the District Court (R. 84–88) and are not disputed. They may be summarized as follows:

Respondent is a Wisconsin corporation engaged at West Milwaukee, Wisconsin, in the manufacture, production, sale and distribution of electric cranes, hoists, motors, welders, power excavating machines, welding electrodes, housing panels and other heavy electrical products, substantial quantities of which are shipped interstate (R. 84). It is admitted that respondent's employees are covered by the Act.

Respondent's production employees are classified into two groups called "incentive workers" and "non-incentive workers." Approximately 1,250, or 50 per cent, of the production workers are incentive workers. They are the only employees involved in this case. By agreement with a union representing its employees, respondent compensates the incentive workers on a piece work system with a minimum hourly guaranty. This method of payment is described in some detail in a stipulation of facts (R. 12–23) but its essential

elements are these: The various jobs performed by the incentive workers are "time studied" by the management. The time which a job is shown to consume is multiplied by a standard earning rate per unit of time, and the amount so obtained is known as the "price" placed on that job. Whenever an employee is given work on a job which has been "priced" in the manner described, he receives a job card bearing the "price," and he is paid for his work the amount that he earns at these piece rates or "job prices," unless this amount falls below his basic hourly rate, such as is assigned to each incentive worker. Each worker is guaranteed this basic hourly rate as a minimum for all hours of employment. For this reason respondent's method of compensation may be described as a piece work system with a minimum hourly guaranty.

As a matter of fact, the incentive worker nearly always performs the work in less time than would produce his guaranteed compensation and, therefore, nearly always is paid not at his basic hourly rate but at the piece rates or "prices" set on his jobs (R. 85, 87). On each pay day about 98½ per cent of all incentive workers have received compensation over and above their base rates (R. 87). For each pay period, the incentive workers as a group have received total compensation, exclusive of overtime payments, approximately 28 per cent in excess of the amount they would have received

at the basic hourly rates (R. 87). Indeed, if a piece rate worker does not make "his average high earning rate" as a result of conditions beyond his control, he is entitled to have an adjustment made to yield him his average premium in excess of the base rate (R. 15).

On a large number of jobs which have not been "time studied", the company has contracted to pay, and does pay, each incentive worker an hourly rate at least 20 per cent higher than his basic hourly rate (R. 86). Likewise, whenever an incentive worker is temporarily assigned to day work, he is paid at least 20 per cent more than his basic hourly rate (R. 15). Hence it appears that the basic rate is not intended to represent normal earnings, but rather a conservatively-estimated basis upon which the incentive system may operate.

Respondent's incentive workers frequently work in excess of the maximum number of hours a week specified in Section 7 of the Act. Respondent pays them overtime only at one and one-half times their basic hourly rates. Their piece rate earnings over and above their base rates have not been included in computing overtime compensation for piece rate employment, notwithstanding the fact that the piece rate earnings form the actual compensation of approximately 98½ per cent of the incentive workers and exceed the base rates by an average of 28 per cent. Likewise, when the in-

centive workers are on hourly rates, respondent pays them overtime calculated on their basic hourly rates and not on the 20 per cent higher hourly rates actually paid them for the basic work week. The way in which this system operates when overtime is worked may be illustrated by the following examples:

Example 1

An incentive worker is assigned a basic hourly rate of $1 an hour. He works 50 hours a week at a constant rate of production, spending all his time on jobs which have been time-studied and given a "price" of $5. He completes 15 jobs in the 50 hours and therefore earns $75. Respondent pays him $75 plus extra compensation for 10 hours of overtime. Respondent computes this premium at 50 per cent of the employee's arbitrary basic rate of $1 an hour ($10 \times .50 \times \$1 = \$5$), giving a total for the week of $80. Actually, this worker in fact was receiving compensation at the rate of $1.50 an hour ($75 ÷ 50 hours); and if the premium for overtime had been computed on the actual rate of $1.50 an hour, it would have amounted to $7.50, giving a total for the week of $82.50.

Example 2

An incentive worker is assigned a base rate of 75 cents an hour. He is employed for a 50 hour workweek on jobs which have not been time-stud-

ied. Accordingly, under the employment contract, he is paid 90 cents an hour for his non-overtime work, an hourly rate 20 per cent above his base rate. In computing the overtime, however, respondent pays only one and one-half times the 75 cent base rate. Thus, this worker receives—

50 hours @ 90 cents	$45.00
10 hours premium compensation @ 37½ cents	3.75
Weekly earnings	48.75

If respondent had paid for the overtime hours at one and one-half times the 90 cent hourly rate which the worker was promised by the contract of employment, and actually received, for all his normal non-overtime hours, the computation would have been—

50 hours @ 90 cents	$45.00
10 hours premium compensation @ 45 cents	4.50
Weekly earnings	49.50

Since the method of computing overtime which respondent followed, as these illustrations show, does not take into account the actual earnings of the employees but is based on an arbitrary rate at least 20 per cent lower, the Administrator brought an action under Section 17 of the Act to compel compliance with Section 7. Respondent sought to justify its practice under the following provision in the collective bargaining agreement under which the incentive workers were employed (R. 14, 85)—

> * * * the parties agree that, for all purposes, the regular rate of pay at which

each employee who participates in an incentive plan is employed, is the base rate of each such employee.

Respondent contended that this contractual provision must be accepted for the purposes of Section 7 under the reasoning of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624, 631, "that as a matter of law employer and employee may establish the regular rate by contract."

The District Court decided that defendant was violating the Act by excluding from the computation of overtime the piece rates actually paid. The court held (R. 83)—

> Wages computed as a result of piece work are just as much a part of regular compensation, and the employees have just as much right to the same, when earned, as they do to wages when computed on base rates. * * *
>
> The sentence which defendant has quoted from the opinion in the *Belo* case does seem to give some basis for its contention that even though the court find the "regular rate" of wages to be one thing, the parties by contract may make some other basis the regular rate, by merely labeling it as such. I do not believe, however, that such an interpretation is warranted. The language on which defendant relies was not necessary to the *Belo* decision and I am convinced that the court did not intend to convey the idea that after the parties had worked out and agreed upon the compensation to be paid,

> they could then agree what the "regular rate" would be for overtime purposes.

The Circuit Court of Appeals reversed this decision. It held that under the *Belo* decision and that in *Walling* v. *Helmerich & Payne, Inc.*, decided by this Court November 6, 1944, an employer and his employees are free to fix by contract the "regular rate" on which overtime shall be computed even though the rate thus established is intended to be, and is, less than the rate at which the employee is actually employed, "provided * * * they act in good faith and respect the minimum of wages * * * fixed by the statute." (R. 100–101). The court further stated (R. 102):

> They [respondent and its employees] therefore defined regular wage and left therefrom the incentive wage * * *
>
> There is only one question before us: What was the regular rate of pay? The employer and employees have, as they had a right to do, answered that question for us. * * * They agreed upon the regular rate of pay, and their regular rate respected the minimum requirement provisions fixed in the statute. We must therefore accept their agreement.

Judge Minton dissented in an opinion which emphasizes the breadth of the court's decision (R. 102–103):

> I cannot agree that the *Belo* case is authority for the bold proposition that, where the "regular rate" of pay is defined by con-

tract, that definition is controlling, if the contract is made in good faith and the rate specified is above the minimum of the Wages and Hours Act.

* * * * *

Because I believe that the "regular rate" fixed by the contract is not the one actually used, and that the "regular rate" is to be determined by what the parties do and not by what they contract to do, I would affirm the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The decision below results, we believe, from a misunderstanding of the decision of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624, and is in conflict with *Walling* v. *Helmerich and Payne, Inc.*, No. 27, this Term.

Ever since the enactment of the Fair Labor Standards Act a fundamental question in the administration of Section 7 has been whether the "regular rate" on which overtime is to be computed is the rate actually paid or may be any rate which the employer and employees agree to treat as the regular rate of pay for the purposes of the section. In *Walling* v. *Belo Corp.* this Court held that an employer and employees could by contract provide for a guaranteed minimum weekly salary and specify a regular hourly rate of pay not lower than the statutory minimum, with overtime compensation of not less than one and one-half times

this specified rate. The Government contended that the regular hourly rate fixed by the contract was not the actual rate of pay for the normal non-overtime hours (316 U. S. at 631–632); but, on the facts before it, the Court rejected this contention and held that the contracts of employment "were intended to, and did, really fix the regular rates at which each employee was employed" (121 F. (2d) at 210; 316 U. S. at 629–630). It is quite apparent, therefore, that this Court's further statement (p. 631) that "it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract" had reference to a contract fixing the actual rate of pay and does not justify agreements attempting to fix for the purposes of Section 7 regular rates which are not intended to be, and are not, the actual rates at which the employees are employed. The fact that the employees enjoyed the security of an assured weekly income under their agreements was, also, an important factor in the decision of the *Belo* case. (316 U. S. at 635.)

The principle stated by this Court has been the basis of the administration of the Act. The Administrator has consistently held that an employer and his employees are free to fix by contract at any amount in excess of the statutory minimum the employees' actual, regular rate of compensation—*i. e.*, the rate which the employees are in fact paid for normal, non-overtime employment.

But it has also been his consistent position that, once the actual rate of compensation for non-overtime work has been fixed by the employment agreement, the employer must pay one and one-half times that rate for overtime and cannot escape this obligation by any contractual arrangement fixing for the purposes of Section 7 some other rate as the "regular rate of pay".

A number of courts, however, have held the *Belo* decision to mean that the parties may fix as the "regular rate" for the purposes of Section 7 any rate which exceeds the statutory minimum, even though it is not intended to be, and is not, the actual basis of the employees' compensation for normal, non-overtime work. See *e. g., Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), affirmed *sub nom., Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5); *Walling* v. *Emery Wholesale Corp.*, 49 F. Supp. 192 (N. D. Ga.), affirmed, 138 F. (2d) 548 (C. C. A. 5); *Walling* v. *Villaume Box & Lumber Co.*, 6 Wage Hour Rept. 544 (D. Minn. 1943); *Walling* v. *Lexington Roller Mills*, 6 Wage Hour Rept. 923 (E. D. Ky. 1943); *Walling* v. *Uhlmann Grain Co.*, 7 Wage Hour Rept. 128 (N. D. Ill. 1944).

One of the most extreme of these decisions was *Walling* v. *Helmerich & Payne, Inc.*, 138 F. (2d) 705 (C. C. A. 10), which this Court brought before it by writ of certiorari. The judgment below was reversed in an opinion which holds that the regu-

lar rate is to be determined from "the wages actually received". This Court there said (slip opinion, p. 3)—

> While the words "regular rate" are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek.

This decision, we believe, should have been understood to establish the proposition that no rate of pay not actually observed during normal, non-overtime hours of work, even though labelled in a contract as the "regular rate", comes within the meaning of Section 7. In *Walling* v. *Youngerman-Reynolds Hardwood Co.*, in which a petition for certiorari is being filed concurrently with this petition, however, the Circuit Court of Appeals for the Fifth Circuit did not so construe the *Helmerich & Payne* decision, but held that an employer who was paying piece rates actually yielding approximately 59 cents an hour during both overtime and non-overtime hours might avoid paying one and one-half times those rates for overtime by means of contracts with his employees which recited that 35 cents an hour should be their "regular rate" of pay. Similarly in the instant case, the court below recognized that its decision permitted the employer to compute the 50 per cent premium for overtime without including the incentive bonuses which were in fact paid to 98½ per cent of the workers as part of their regular compensation and which constituted 22

per cent of each payroll exclusive of overtime. The court held, nevertheless, that this result was proper under the decisions of this Court.

If these two decisions prevail, it will be possible for an employer, if he can secure or compel the acquiescence of his employees, to nullify by private contract the overtime provisions of the Fair Labor Standards Act at least as applied to piece workers. Congress intended Section 7 to apply to piece workers as well as to employees who are paid on an hourly basis. Piece rates "must be translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory overtime requirements have been fulfilled" (*United States* v. *Rosenwasser*, No. 106, this Term, slip opinion, p. 3). It is apparent in the instant case, therefore, that the compensation of an incentive worker for each overtime hour in a given week should be one and one-half times an amount determined by dividing his piece rate earnings by the number of hours worked. The Court below, however, looked only to the contract which labelled as the "regular rate" an artificial amount 22 per cent less on the average than the actual compensation reduced to an hourly basis. Solely because of this label, the court below held that it was within the statute for respondent to calculate the overtime premium on the lower, artificial rate to which the parties agreed and not on the actual non-overtime compensation. Upon

this basis, the overtime premium was 22 per cent less than that prescribed by Section. 7.[1]

There is in this case no such total evasion of Section 7 as is present in the *Youngerman-Reynolds* case, in which the hourly "regular rate" was set so low as altogether to avoid additional pay for overtime work; but the type of arrangement employed is essentially the same. By means of such a device, the Fair Labor Standards Act may be reduced to a minimum wage law when it suits the purposes of an employer or of both parties to the employment relation to have it so. The two-fold purpose of Section 7, namely (1) to spread employment by rendering overtime more costly than regular employment and (2) to confer a

[1] It should be emphasized that the instant case does not present a situation in which the employer and employees have fixed a regular rate of pay by contract making an "effort to base the regular rate upon the wages actually received" and "the hours actually and regularly spent each week in working" (*Walling* v. *Helmerich & Payne*, slip opinion, p. 4). On the contrary, both parties to the contract knew from experience that the incentive workers regularly earned, on the average, 28 per cent more than their so-called base rates of pay. For this reason an incentive worker was paid 20 per cent more than his base rate whenever he was placed on a job for which no "price" had been set.

It is also significant that piece rates were to be adjusted by means of grievance procedure whenever a worker could not make "his average high earning rate" (R. 15), i. e., his normal incentive premium. The decision below necessarily holds that in fixing a regular rate for the purposes of Section 7 the employer and employees need not make even a a reasonable approximation of the actual rate paid for non-overtime hours but may select any lower, arbitrary rate which they deem convenient.

wage benefit upon employees during overtime hours (see *Walling* v. *Helmerich & Payne*, slip opinion, p. 3), may be totally defeated. In the present case that purpose was seriously impaired.

The principle here involved is not limited to piece rate workers. If a fictitious "regular rate" may be substituted for actual piece rates for the purpose of calculating overtime, it is difficult to see why a similar substitution for regular hourly or daily wages may not be made. Respondent does in fact calculate the overtime compensation of incentive workers who are temporarily being paid by the hour, not on the hourly rates actually being paid, but on the lower, arbitrary base rates. Such an arrangement, accompanied by an arbitrary designation of certain hours each day as "overtime" hours, was declared to be illegal in *Walling* v. *Helmerich & Payne, supra*. The conflict between that case and the present one, together with the need of correction of the present decision at the hands of this Court, thus becomes apparent.

Until the present situation is clarified, it will be impossible to achieve a rational and fair administration of Section 7. If the *Youngerman-Reynolds* and *Harnischfeger* decisions are permitted to stand, the Administrator cannot continue to insist that the actual rate of compensation is controlling for overtime purposes without arousing the charge that he is acting in disregard of binding court decisions—a charge which tends to bring

the administration of the Act into disrepute. He cannot, on the other hand, acquiesce in the view of these cases without partially setting at naught the principle enunciated by this Court in *Walling* v. *Helmerich & Payne, Inc., supra* (slip opinion, p. 3), and reiterated in *United States* v. *Rosenwasser* with especial reference to piece workers (slip opinion, p. 3), that "the words 'regular rate' * * * obviously mean the hourly rate actually paid for the normal, non-overtime workweek." In any event, discrimination and unfairness in the operation of Section 7 will result unless this Court adjudicates the questions now presented; for some employers will pay overtime on the basis of actual regular rates of pay while others, on the basis of the decisions here sought to be reviewed, will stipulate with their employees that lower "regular" rates shall be used in calculating overtime. The evil of unfair competition with respect to hours of work and rates of overtime pay will flourish without the check which Congress intended.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MACGS,
Solicitor of Labor.

FEBRUARY 1945.

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HARNISCHFEGER CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 68) is reported at 54 F. Supp. 326. The opinions of the Circuit Court of Appeals (R. 81–87) are not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 17, 1944 (R. 88). The petition for certiorari was filed February 17, 1945, and granted April 2, 1945. The jurisdiction of this Court is based upon Section 240 (a) of the

Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the payment of overtime at one and one-half times an hourly rate labelled by contract as the "regular rate" of pay meets the requirements of Section 7 of the Fair Labor Standards Act despite the fact that the contract rate is not the actual rate of hourly compensation but excludes piece work and other "incentive" payments earned by approximately 98½ percent of the employees involved ~~and~~ which amount to about 22 percent of their earnings exclusive of overtime.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *
>
> (3) for a workweek longer than forty hours after the expiration of the second year from * * * [the effective] date [of this section], unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

The facts are adequately set forth in the findings of fact and conclusions of law entered by the District Court (R. 70–74) and are not disputed. They may be summarized as follows:

Respondent is a Wisconsin corporation engaged at West Milwaukee, Wisconsin, in the manufacture, production, sale and distribution of electric cranes, hoists, motors, welders, power excavating machines, welding electrodes, housing panels and other heavy electrical products, substantial quantities of which are shipped interstate (R. 70–71). It is admitted that respondent's employees are covered by the Act.

Respondent's production employees are classified into two groups called "incentive workers" and "non-incentive workers." Approximately 1,250, or 50 percent, of the production workers are incentive workers (R. 71). They are the only employees involved in this case. By agreement with a union representing its employees, respondent compensates the incentive workers on a piece work system with a minimum hourly guaranty. This method of payment is described in some detail in a stipulation of facts (R. 7–19) but its essential elements are these: The various jobs performed by the incentive workers are "time studied" by the management. The time which a job is shown to consume is multiplied by a

"standard earning rate"[1] per unit of time, and the amount so obtained is known as the "price" placed on that job. Whenever an employee is given work on a job which has been "priced" in the manner described, he receives a job card bearing the "price," and he is paid for his work the amount that he earns at these piece rates or "job prices." Each incentive worker, however, is also assigned a "basic hourly rate",[2] which he is guaranteed as a minimum for all hours of employment. The consequence is that although an incentive worker is paid all that he may earn at the piece rates, he never receives less than his base rate of pay. For this reason respondent's method of compensation may be described "as a piece work system with a minimum hourly guaranty"[3] (R. 69).

---

[1] The hourly rate of pay which workers generally in the Milwaukee area receive for that type of work. (Fdg. V, R. 72.)

[2] This term "basic hourly rate" and its equivalent "base rate" are the expressions used in the Harnischfeger contract and, consequently, in order to avoid cumbersome circumlocutions, we have continued to use them to describe the rate per hour guaranteed as a minimum. The use of these terms in this brief does not imply that the "basic hourly rates" here could be regarded as "basic hourly rates" under Section 6 of the Walsh-Healey Public Contracts Act, 49 Stat. 2036, 41 U. S. C. 35; 40. We respectfully suggest, moreover, that the Court may wish to guard in its opinion against the confusion of these terms.

[3] At various points in the record the difference between the employees' earnings at the piece rates or job prices and the amounts they would have earned at their base rates have been described as piece work or incentive bonuses or simply as bonus payments.

As a matter of fact the incentive worker nearly always performs his jobs with sufficient speed to earn more at the piece rates or job prices than he would earn at his basic hourly rate. Hence, he is nearly always paid not at his basic hourly rate but at the piece rates or "prices" set on his jobs (R. 72–73). On each pay day about 98½ per cent of all incentive workers have received compensation over and above their base rates (R. 72). Incentive payments make up 22 percent of each payroll, excluding overtime (R. 72–73). In other words, for each pay period, the incentive workers as a group have received total compensation, exclusive of overtime payments, approximately 28 percent in excess of the amount they would have received at the basic hourly rates. Indeed, if a piece rate worker does not make "his average high earning rate" on "single piece or small order jobs" as a result of conditions beyond his control, he is entitled under Section 3 (j) of the contract to have an adjustment made to yield him his average premium in excess of the base rate (R. 12).

On a "great number of jobs" which have not been "time studied," the company has contracted to pay, and does pay, each incentive worker an hourly rate at least 20 percent higher than his basic hourly rate[4] (R. 72). Likewise, whenever

[4] In fact since March 16, 1942, the company has agreed to pay for such work the still higher "average hourly earnings" (R. 61).

an incentive worker is temporarily assigned to day work,[3] he is paid at least 20 percent more than his basic hourly rate (Sec. 3 (h), R. 12). Under Section 13 (d) of the contract vacation pay is based on the employee's average hourly straight time earnings over a three-month period and not on his base rate (R. 18). Hence it appears that the basic rate is not intended to represent normal earnings, but rather a conservatively-estimated basis upon which the incentive system may operate.

Respondent's incentive workers frequently work in excess of the maximum number of hours a week specified in Section 7 of the Act. Respondent pays them overtime premiums of only one-half their basic hourly rates. This method of compensating workers for overtime has been in effect since 1933 and no change in the basis for computing overtime was made in 1938 when the Fair Labor Standards Act became effective (R. 55–56). Notwithstanding the fact that the incentive earnings form the actual compensation of approximately 98½ percent of the incentive workers and exceed the base rates by an average of 28 percent, the employees' piece rate earnings over and above their base rates have not been included in computing overtime premiums for piece rate employment. Likewise, when the incentive workers

[3] Day work is work paid for on an hourly as distinguished from a piece basis (R. 36).

are on hourly rates, respondent pays them overtime calculated on their basic hourly rates and not on the 20 percent higher hourly rates actually paid them for non-overtime hours. The way in which this system operates when overtime is worked may be illustrated by the following examples:

Example 1

An incentive worker is assigned a basic hourly rate of $1 an hour. He works 50 hours a week at a constant rate of production, spending all his time on jobs which have been time-studied and given a "price" of $5. He completes 15 jobs in the 50 hours and therefore earns $75. Respondent pays him $75 plus extra compensation for 10 hours of overtime. Respondent computes this premium at 50 per cent of the employee's arbitrary basic rate of $1 an hour ($10\times.50\times\$1=\$5$), giving a total for the week of $80. Actually, this worker in fact was receiving compensation at the rate of $1.50 an hour ($75÷50 hours); and if the premium for overtime had been computed on the actual rate of $1.50 an hour, it would have amounted to $7.50, giving a total for the week of $82.50.

Example 2

An incentive worker is assigned a base rate of 75 cents an hour. He is employed for a 50 hour workweek on jobs which have not been time-

studied. Accordingly, under the employment contract, he is paid, exclusive of the overtime premium, 90 cents an hour for all hours, an hourly rate 20 per cent above his base rate. For the overtime premium, however, respondent pays only one-half the 75 cent base rate. Thus, this worker receives—

50 hours at 90 cents	$45.00
10 hours premium compensation at 37½ cents	3.75
Weekly earnings	48.75

If respondent had paid a premium for the overtime hours at one-half the 90-cent hourly rate which the worker was promised by the contract of employment and actually received for each of the 50 hours that he worked, the computation would have been—

50 hours at 90 cents	$45.00
10 hours premium compensation at 45 cents	4.50
Weekly earnings	49.50

Respondent's method of computing overtime, as these illustrations show, is based on an arbitrary rate which does not take into account the full actual earnings of the employees, which are at least 20 per cent higher. Accordingly, the Administrator brought an action under Section 17 of the Act to compel compliance with Section 7. Respondent admitted its practice but sought to justify it under the following provision in its collective bargaining agreement (Sec. 3 (e); R. 11, 71)—

> * * * the parties agree that, for all purposes, the regular rate of pay at which

> each employee who participates in an incentive plan is employed, is the base rate of each such employee.

Respondent contended that this contractual provision must be accepted for the purposes of Section 7 under the statement of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624, 631, "that as a matter of law employer and employee may establish the regular rate by contract."

The District Court decided that respondent was violating the Act by excluding from the computation of overtime the piece rates actually paid. In his written opinion, Judge Duffy said that he was "convinced that the court did not intend" in the *Belo* case "to convey the idea that after the parties had worked out and agreed upon the compensation to be paid, they could then agree what the 'regular rate' would be for overtime purposes." (R. 70).

The Circuit Court of Appeals reversed this decision (R. 88). It held that an employer and his employees are free to fix by contract the "regular rate" on which overtime shall be computed even though the rate thus established is intended to be, and is, less than the rate at which the employee is actually employed, "provided * * * they act in good faith and respect the minimum of wages * * * fixed by the statute." (R 85). Judge Minton dissented, holding that "the 'regular rate' is to be determined by what the parties do and not by what they contract to do" (R. 87).

SPECIFICATION OF ERRORS

1. The court below erred in holding that the "base rates" of the incentive employees of respondent are their "regular rates" of pay for the purpose of computing overtime under Section 7 of the Fair Labor Standards Act, thereby excluding piece work "incentive" payments and other additional payments which constitute part of the normal compensation of approximately 98½ per cent of them.

2. The court below erred in reversing the decree of the District Court and directing dismissal of the complaint.

ARGUMENT

BY EXCLUDING THE "BONUS" PART OF THE EARNINGS OF INCENTIVE WORKERS FROM THE BASE UPON WHICH OVERTIME PREMIUMS ARE COMPUTED, RESPONDENT FAILS TO COMPLY WITH SECTION 7 OF THE FAIR LABOR STANDARDS ACT

Section 7 of the Fair Labor Standards Act provides that no employee may be employed in commerce or in the production of goods for commerce for more than 40 hours a week unless he is compensated for the overtime hours "at a rate not less than one and one-half times the regular rate at which he is employed." That provision applies to workers on "piece rate and incentive systems" as well as to workers paid on an hourly rate. *United States* v. *Rosenwasser*, 323 U. S. 360, 361–362. In *Walling* v. *Helmerich & Payne*,

Inc., 323 U. S. 37, 40, this Court held that although "the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek." In our brief in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, No. 955, this Term, we have discussed the principles underlying Section 7 and have shown that the interpretation adopted in the *Helmerich & Payne* decision applies equally in the case of piece rate workers; they must be paid for overtime at not less than one and a half times their actual rate of earnings at the piece rates, or else at not less than one and a half times the piece rates paid during normal non-overtime hours.

It follows that Harnischfeger does not comply with Section 7 merely by paying a 50 per cent premium for overtime calculated on the "base rates" assigned to the incentive workers. The record establishes beyond question that although a few workers receive only the basic hourly rates guaranteed as a minimum,[6] in nearly all instances the piece rates or "job prices" make up the incentive workers' actual compensation and thus determine the regular rates at which they are in fact employed. Each pay day 98½ per cent of the incentive workers receive some compensation over and above the base rates. The amount of

[6] There is no dispute that as to such workers Section 7 (a) is complied with by the payment of one and one-half times the basic hourly rate as the contract provides.

the excess (sometimes called the "incentive bonus") varies from employee to employee; but since 22 per cent of each pay roll is made up of bonuses, the average worker's actual hourly earnings exceed his base rate by 28 per cent (R. 72–73, fdg. VIII).

Other provisions in the contract also show that Harnischfeger and its employees intended that the employees' base rates should not be their actual compensation:

(1) Whenever an incentive worker is performing one of the "great number" of jobs for which a time study has not been completed, he is entitled under Section 3 (h) of the collective bargaining agreement to be paid an hourly rate at least 20 per cent higher than his guaranteed base rate (R. 72, fdg. VII; R. 12).[7]

(2) Section 3 (i) provides that when an incentive worker is requested to do ordinary day work "he shall receive a premium of not less than twenty (20%) per cent over his hourly base rate" (R. 12). Although the incentive workers are seldom put on day work, the presence of this clause in the contract is strong evidence that they regard the piece rates and their piece work earnings as the regular compensation for which they are employed.

[7] Respondent's work manager testified that it "would not be fair" to ask a man who was earning more than the base rate at piece jobs to work for "only his base rate" at jobs which were not priced (R. 47).

(3) Similarly, although there may never have been any occasion for the employees to invoke Section 3 (j) of the contract, which promises adjustments in piece rates on small order jobs in order to enable any worker so assigned to maintain "his average high earning rate," the very fact that the workers bargained for such a provision shows that the base rates were known to be substantially lower than their normal rates of pay.

(4) Section 3 (g) of the employment contract makes it plain that employees are expected to earn substantially more at piece rates than their base rates. The respondent agreed not to cut established piece rates "even though the employee is able to turn in as much as twenty (20%) per cent over the standard earning rates." (R. 12.)

(5) The contract grants vacations with pay and provides for payment for the vacation period at the "average hourly earnings", not at the base rates. (Section 13, R. 18; R. 8.)

These provisions of the collective bargaining agreement as well as the actual payments made under it, show that the contract was intended to, and really did, fix the piece rates as the actual rates of pay during the normal non-overtime workweek for the 98½ per cent of the incentive workers whose earnings at the piece rates exceed the minimum hourly guaranty. The piece rates, therefore, were the "regular rates" at which the incentive workers were employed and, under the decisions in *Walling* v. *Helmerich & Payne, Inc.*,

supra, and *United States* v. *Rosenwasser*, 323 U. S. 360, Harnischfeger is required to use those rates in computing the overtime premium. Cf. *Walling* v. *Stone*, 131 F. 2d 461, 464 (C. C. A. 7) (holding that under "a piece rate system with a minimum hourly guaranty," the difference between the actual piece work and the guaranteed minimum "ought to be included, in determining the 'regular rate' under § 7").

Harnischfeger seeks to justify its present method of calculating overtime from the base rates and not the actual rates on the ground that Section 7 leaves the parties to an employment contract free to agree upon the regular rate of pay. From this premise it is argued that Harnischfeger is free to fix the base rates as the regular rates for purposes of Section 7 even though they are 22 percent less than the actual rate of compensation for normal, non-overtime employment.[8] This contention is essentially the same as that advanced by the respondent in *Walling* v. *Youngerman-Reynolds Harwood Co.*, *supra*, and is equally untenable. For reasons which we have stated more fully in our brief in that case, it is clear on both

[8] We use the term "the actual rate of compensation for normal, non-overtime employment" without discrimination to cover either the rate of an employee's compensation for the entire week excluding only overtime premiums, or his rate of compensation for the first 40 hours. Theoretically there may be a difference between the two. However, the question is not involved in this case or in No. 955, now before the Court; for so far as either record shows, the rate is the same whichever way it is computed.

principle and authority, (1) that Section 7 refers to the rate at which an employee is in fact paid[9] for normal, non-overtime employment and (2) that once this actual rate of compensation is fixed by agreement, the parties may not contract that a different rate shall be used as the "regular rate" for the purposes of Section 7. Consequently, after Harnischfeger and the union representing its employees had agreed that the piece rates should be the actual basis of compensation for regular non-overtime employment in the case of any worker who earned more than the minimum hourly guaranty, they could not set aside the provisions of Section 7 by agreeing that the base rate should be treated as the regular rate for the purpose of computing overtime.

The opinion in *Walling* v. *Helmerich & Payne, Inc., supra,* is explicit on this point. This Court there said (p. 42):

> It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between em-

[9] Respondent emphasizes that the language of Section 7 (a) is "the regular rate *at which he is employed*," not the regular rate at which the employee is *paid*. (Br. in opposition, p. 3). But this Court held in *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 40, that the words regular rate "obviously mean the hourly rate actually paid for the normal, non-overtime work-week."

> ployer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.

That the base rate was specified to be controlling, instead of the actual hourly earnings, in a contract arrived at by collective bargaining is of no legal significance. The Act carefully limits, by Section 7 (b), the circumstances under which the requirements of Section 7 (a) can be superseded by collective bargaining agreement. See *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 602–603.

The two differences between the *Harnischfeger* system and the *Youngerman-Reynolds* contracts, to which respondent may point, are not significant. One is that Harnischfeger pays a premium for overtime employment over and above the incentive workers' piece rate earnings whereas Youngerman-Reynolds treats the piece rate earnings as including both the fictitious regular rate and

overtime compensation. Obviously this is a difference only in the degree to which Section 7 has been violated; for Section 7 requires not merely that an overtime premium be paid but that the premium be at least 50 percent of the regular rate of compensation. The Harnischfeger arrangement is no different in principle from an arrangement which provides that overtime shall be paid at one and one-third or one and one-fourth times the regular hourly rate of earnings. The examples given at pp. 7–8, *supra*, show that the premium computed by Harnischfeger is not enough to meet the requirements of Section 7.[10] In the first illustration in Respondent's Exhibit No. A (R. 66–67) the worker receives approximately one and one-third times his non-overtime earning rate for overtime hours (1-35/100 x 1.00, his hourly rate). In the second illustration Man "A" earned $20 for 25 hours work or 80¢ an hour. He received an overtime premium of 32¢ an hour or 2/5 of the hourly rate. He has therefore been paid only time and two-fifths for overtime hours.

Second, Harnischfeger argues that under its incentive system the "basic hourly rates" do have

[10] It is to be noted that the non-incentive production and the non-production employees of Harnischfeger receiving straight hourly wages have their overtime premium computed upon their total hourly compensation and not merely upon a part of their earnings as in the case of incentive workers. (Sec. 4 (a), R. 13.) So too, workers on night shifts have their differentials of 5¢ and 8¢ an hour included in the base for overtime computations. (Sec. 4 (d), R. 14; R. 42.)

some practical significance whereas in the *Youngerman-Reynolds* case the so-called "regular rate" has none. It is true, as respondent points out, that the Harnischfeger base rates are used to determine the employees' compensation when they are called in and work is not available (R. 14) or to compensate them for lost time when they are reinstated to positions from which they have been improperly discharged (R. 17). It is doubtless for these reasons as well as because they are often paid hourly rates 20 per cent above their base rate that the incentive workers from time to time seek increases in their base rates of pay. It is not our contention that the base rates were included in the collective bargaining agreement for the purpose of circumventing Section 7,[21] although we know of no other reason for labelling them as the "regular rate for all purposes". Our position is that when the workers earn at the piece rates more than the base rates, the piece rates must be used to determine the "regular rate" of pay. The practical significance which a rate may have on some occasions does not justify using it in computing overtime for periods when it does not represent actual earnings, instead of the actual rate of compensation to which Section 7 so plainly refers.

In some respects the present case illustrates the fault in the respondents' arguments even more

[21] We have noted above that the method of overtime compensation here involved has been employed by respondent without change since 1933, which may explain the failure of the contract provisions to satisfy the overtime requirements of the Act.

clearly than the *Youngerman-Reynolds* controversy. There is no pretense in the Harnischfeger plan that any part of the incentive payments are allocable to overtime. Unlike Youngerman-Reynolds, Harnischfeger attempts to break an hourly wage into two parts and treats one part as the regular rate of pay, excluding the other. Thus, there are a great many jobs performed by incentive workers in the Harnischfeger plant for which no piece rates have been set. On such occasions they are paid hourly rates at least 20 percent higher than their basic rates of pay (R. 86). An incentive worker whose base rate is 75 cents an hour, for example, will receive the sum of 90 cents an hour, hour after hour and week after week, so long as he is performing work for which no piece rates have been established. Obviously, 90 cents an hour is the "regular rate" at which this employee is employed, notwithstanding the provision in the contract reciting that the 75-cent base rate shall be the regular rate "for all purposes", and the legislative policy underlying Section 7 can be achieved only by calculating the 50 percent premium on that basis. By treating 75 cents as the regular rate of pay, Harnischfeger employs such workers for more than 40 hours a week without paying the full overtime premium to the employees and without incurring the full 50 percent increase in labor costs which Congress intended.

Since we have discussed *Walling* v. *Belo Corp.*,

316 U. S. 624, in our brief in the *Youngerman-Reynolds* case, it is enough here to point out that two factors, either of which alone would be sufficient, distinguish the *Belo* case from those now before the Court. First, it is clear that the statement in the *Belo* opinion that the "employer and employee may establish the 'regular rate' by contract" [12] means only that the Act leaves the employer and employees free to work out the actual rate at which the employees will be compensated for their regular hours of work; for the Court held only that "the contracts were 'actual bona fide contracts of employment' and that 'they were intended to, and did, really fix the regular rates at which each employee was employed'" (316 U. S. at 629–630). In the instant case, the piece rates were the actual rates of pay fixed by the collective bargaining agreement except on those few occasions when incentive workers earned less at those rates than the base rates guaranteed as a minimum. Second, the *Belo* contract was sustained as a means by which employers and employees could fix an actual, regular hourly rate of pay and still secure a fixed weekly income for employees whose hours of work fluctuated greatly. The Harnischfeger contract has no such provisions.

The guaranty to which respondent refers as the equivalent of the security of the fixed weekly wage in the Belo plan is merely a guaranty of a

[12] 316 U. S. at 631.

minimum hourly rate. It does not assure any stability in weekly earnings. The employment arrangement in *Walling* v. *Helmerich & Payne* was condemned by this Court even though it assured a fixed daily wage.

The respondent is seeking to continue a scheme of overtime payments in force since 1933 and framed without regard to the requirements of the Fair Labor Standards Act, whereby it avoids payment of the full overtime premium required by the Act.

CONCLUSION

An employer's actual wage bill, exclusive of overtime premiums, determines the "regular rate" of pay. He cannot circumvent the statute by calling one part of that wage bill a "basic hourly rate" and another part an "incentive bonus".

The judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 956

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Petitioner,

vs.

HARNISCHFEGER CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counsel for the petitioner beg the entire issue when, in the "Question Presented" on page 2 of their Petition, they refer to *"a rate labelled by contract."*. The use of this phrase *assumes* the contract rate is fictitious or unreal and bears no relations to the actual wages paid. There is no question of *bona fides* of the contract in the instant case.

The real issue is: Where the parties in good faith agreed upon and fixed by the written contract the rate at which the employees were employed is such contract valid? Counsel cannot ignore the express determination of the Circuit Court of Appeals (R. 101) that:

> "If the wage agreement in this case did not settle the regular rate in a bona fide manner through nego-

> tiation and did not respect the statutory minimum provisions, we are at loss to know how the parties may cover the subject by agreement."

In contrast to the situation in *Walling vs. Youngerman-Reynolds Hardwood, Inc.*, No. 955, October term, 1944, for which Petition for Certiorari is also concurrently sought (See p. 15 of the Petition herein) the Harnischfeger system of compensation has been in effect since 1927 (R. 9) and overtime compensation above 40 hours has been regularly paid since 1933 (R. 49). Local Union 1114 (C. I.O.) of the United Steelworkers of America was the sole collective bargaining representative of the employees and was recognized as such by the Harnischfeger Corporation (R. 9, 13). Such collective bargaining representatives are favored by the Fair Labor Standards Act, and certain agreements made as a result of collective bargaining by such representatives are exempt from the overtime provisions of that Act. (See Section 7(b) of Fair Labor Standards Act).

The employment agreement in question was with this union and has been renewed annually at least since October 24, 1938, the effective date of the Fair Labor Standards Act (R. 9). The renewal in evidence was dated December 9, 1942, on which date the consistent position of the Administrator as to the method of computing the regular rate under incentive systems, when the parties had not validly fixed it by contract, was well known. (See Interpretive Bulletin No. 4, issued November, 1938, and revised November, 1940).

Counsel state the position of the Administrator on page 12 of their brief, as follows:

> "But it has also been his (Administrator's) consistent position that, once the actual rate of compen-

> sation for non-overtime work has been fixed by the employment agreement, the employer must pay one and one-half times that rate for overtime and cannot escape this obligation by any contractual arrangement fixing for the purposes of Section 7 some other rate as the 'regular rate of pay'."

We agree with this statement.

This Court will note that throughout their brief counsel erroneously refer to the "regular rate *of pay*." The statute uses no such language. It is explicit and refers to "the regular rate *at which he is employed*." Under the doctrine of *Walling vs. Belo Corp.*, 316 U.S. 624, this means the rate fixed in good faith by the employment agreement. Payments resulting from incentive earnings necessarily vary from day to day and from employee to employee, i.e. the "rate of pay" is varying and irregular; "the rate at which he (the employee) is employed" is, under this contract, fixed and regular. If Congress had intended that overtime should be one and one-half times the regular rate at which the employee is *paid*, it would not have said "the rate at which he is *employed*." This is the construction placed upon the statute by this Court. Petitioner's claim that the Circuit Court of Appeals for the Seventh Circuit misundersood the decision of this Court is without foundation.

In *Overnight Motor Co. vs. Missel*, 316 U.S. 572, Mr. Justice Reed after discussing the constitutional issues raised, said at page 579:

> "* * * we are concerned at this point only with the method of finding the regular rate *under the contract with respondent*." (Italics supplied)

Since the contract specified only a weekly salary with variable hours of work per week, this court determined that the regular rate at which the employee was em-

ployed was the rate per hour at which the employee was actually compensated. However, Mr. Justice Reed further stated at page 581:

> "*This contract differs* from the one in Walling v. Belo Corp., post, p. 624, where the contract *specified an hourly rate and not less than time and a half for overtime*, with a guaranty of a fixed weekly sum and required the employer to pay more than the weekly guaranty where the hours worked at the contract rate exceeded that sum." (Italics supplied)

In *Walling vs. Belo Corp.*, 316 U.S. 624, Mr. Justice Reed dissented on the issue as to what the parties had intended to be the regular rate of compensation for the employees, but at page 636, he said:

> "The Court's interpretation that, *in the absence of bad faith*, any form of contract which assures the payment of the minimum wage and the required overtime complies with the Act may be assumed to be correct." (Italics supplied)

That this was in fact the *ratio decidendi* of the decision is established by the language of Mr. Justice Byrnes, at page 631:

> "In its initial stage the question to which this dispute gives rise is a question of law, a question of interpretation of the statutory term, 'regular rate.' *But it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract.* In the case before us, such an effort has been made, and in the example given the regular rate has been specified as 67 cents an hour. The difficulty arises from the inclusion of the $40 guaranty. The problem is whether *the intention of the parties* to set 67 cents an hour as the regular rate squares with their intention to guarantee a weekly income of $40. The Administrator's position is that these two objectives are inherently inconsistent and that the intention to fix the regular hourly rate at 67 cents is

> overriden by the intention to guarantee the $40 per week." (Italics supplied)

This Court rejected the contention of the Administrator, which is again urged here, and held that compliance with the Belo contract did not violate the Fair Labor Standards Act.

This rule, namely, that a written agreement of employment, which fixes the regular rate at which the employee is employed, is controlling *if made in good faith*, was again affirmed by this Court in *Walling vs. Helmerich & Payne, Inc.*, No. 27, October term, 1944, decided November 6, 1944, wherein it was stated by Mr. Justice Murphy:

> "The Act clearly contemplates the setting of the regular rate *in a bona fide manner through wage negotiation* between employer and employee, provided that the statutory minimum is respected." (Italics supplied)

This is wholly consistent with the decision in *Walling vs. Belo Corp.*, 316 U.S. 624, and *Overnight Motor Co. vs. Missel*, 316 U.S. 572, and completely negatives the claim of the Administrator in his petition that this Court's decisions have been misunderstood by the Circuit Court of Appeals for the Seventh Circuit.

Manifestly, in the case of a written employment agreement made in good faith, as conceded here, the best evidence of the rate at which an employee is employed is the written agreement. The Administrator relies upon one of the most common fallacies in logic identified by the phrase *"post hoc ergo propter hoc."* The fact that an employee received $X.00 at the end of a pay period does not negative the written agreement nor establish that the rate at which he was employed is $X.00 divided

by the hours worked. The statute neither requires nor supports this reasoning. In the *absence* of an express agreement on this point, the earnings are, of course, presumptive evidence. But it is fallacious and contrary to the express language of the statute to ignore the written agreement of the parties made in good faith and rely entirely upon such assumptions.

The specific contract provisions in question were set forth by the trial court (R. 85) in his findings of fact, as follows:

> "Section 3(e) of the employment contract provides: '* * * for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed, is the base rate of each such employee. * * *' Section 4(a) of the contract provides: 'The Company will operate all shop departments on a basic eight (8) hour day and forty (40) hour week, with time and one-half, computed for incentive workers on their base rate as heretofore defined in Section 3, paragraph (e) * * *.'"

The following contract provisions are likewise consistent only with this expressed intent on the part of the employer and employees:

(a) By Section 7 of the contract, the parties agreed that if an employee was improperly discharged, he should be reinstated with full compensation at his "regular base rate" for the time lost (R. 21).

(b) Section 4(f) of the contract provides that when an employee reports for work without notice during the previous day not to report, he must be supplied with either four hours work or be paid four hours "day rate pay." Day rate pay is synonymous with base rate (R. 17, 43).

(c) The incentive workers constantly request and are given merit increases in their base rates. They are constantly being upgraded and base rates increased through such merit upgrading. As many as 300 such increases are ordinarily given in each day period (R. 57-58).

(d) Although the large majority of the incentive employees (98½%, but 49% of all *production* employees (R. 85) customarily earn *some* incentive earnings above base rate, many employees *earn no incentive premium* and, in fact, actually *earn less at piece work* than the amount of their base rates. *In such cases they receive the base rate.* This difference between the base rate and the piece work earnings is called "excess labor" which averages $56.00 per month of $67,200 per annum (R. 52).

The opinion in *Walling vs. Belo Corp.*, 316 U.S. 624, at page 631, may be paraphrased to apply to this case as follows: (The facts of this case are in italics, the corresponding facts from the opinion are in parenthesis)

> "The difficulty arises from the inclusion of the *incentive earnings* ($40 guarantee). The problem is whether the intention of the parties to set the *base rate* (67 cents an hour) as the regular rate squares with their intention to *provide an opportunity to make incentive earnings* (guarantee a weekly income of $40). The Administrator's position is that these two objectives are inherently inconsistent and that the intention to fix the regular hourly rate at *the base rate* (67 cents) is overriden by the intention to *pay incentive earnings if earned* (guarantee $40 per week)."

The Circuit Court of Appeals, following the rule of this Court held the intention to employ at the base rate and to pay overtime on that rate as the "regular rate" controlled any implied intention to pay overtime based on incentive earnings if earned.

There is no dissatisfaction with the contract expressed on the part of the Union or any of the employees. The Circuit Court of Appeals stated: "There is a mutual concession of good faith between opposing litigants ***" (R. 98). Such finding is conclusive in determining that the contract provision is not a mere artificial label or a capricious determination of fictitious and unreal rates. The Court must determine the real intent of the parties, and if such intention is within the framework of the statute, *it must necessarily be controlling.*

It is undisputed that in normal times the management of Harnischfeger Corporation attempts to hold down overtime hours and required special permission to work overtime (R. 54). Although merchandise produced during overtime hours necessarily has a higher labor cost, this company made no attempt to keep track of what merchandise was made in overtime hours (R. 54). In normal operations, overtime is the exception rather than the rule. The contract provision fixing the regular rate at which the incentive worker was employed first appeared in the contract in 1938 when overtime was the exception. Overtime has grown enormously during the war. It will be greatly reduced when normal peacetime operations are resumed. The Fair Labor Standards Act was passed in peacetime and this contract provision was first made in peacetime. *Both are intended primarily to regulate normal peacetime conditions.* By their written contract the parties stated their intention as explicitly as was possible that the base rates shall be the regular rate of employment *for all purposes.*

In support of their argument that the agreement fixing the base rate as the regular rate is fictitious or arbitrary, counsel rely heavily upon the contract provisions that under certain circumstances a pieceworker may receive a

premium of not less than 20% over his hourly base rate (Section 3, paragraphs (h) and (i), R. 15), or when assigned to work "on single piece or small order jobs", he will be paid "his average high earning rate" when this work is done "under conditions beyond his control which make it impossible for him to earn his average high earning rate." (Section 3 (j), R. 15).

The Administrator's brief fails to point out that clause 3 (j) applies only "when a pieceworker is required to work on single piece or small order jobs." (R. 15) The works manager, the sole witness, who was called by the Administrator, testified that under clauses 3 (h) and 3 (i) this premium was paid "not very often, but it does happen, unfortunately" (R. 55), but that the payment of the average high earning rate under clause 3 (j) had never occurred (R. 55-56). He further testified without dispute that the 20% figure was the result of collective bargaining, and that "the fellows that bargained for the contract probably would like it to be 100 per cent." (R. 42).

We desire further to point out that Section 3 (n) of the contract (R. 16) provides for a *cancellation of these premiums at the discretion of the management* for any wilful misuse or abuse of those provisions, and the witness testified this power of cancellation had been invoked. (R. 56).

Manifestly these were clauses to meet emergency situations, some of which never had arisen, and since the premiums could be cancelled by the management, only the base rate was *constant under even these circumstances.*

As in *Walling vs. Belo Corp.*, 316 U. S. 624, the issue here is—What was the intention of the parties and what did *they* consider the controlling factor? There was no

showing in that case as to how often employees worked more than 54½ hours and received more than the weekly guarantee. That provision of the contract was important because it was evidence of the intention of the parties. So here, the *number* of the employees benefiting each pay day is unimportant. It is a mere matter of degree.

An incentive worker, no matter how efficient, may at times fail to earn piece rate earnings equal to his base rate. Mr. Menck testified that there is no customary percentage of piece work earnings; that in some pay periods it has averaged as low as 5% and in others as high as 29% (above the base rate), and said "She can go all over the lot" (R. 67), and sometimes even "the best men in our place * * * don't earn a cent" of piece work earnings. (R. 43).

The contract evidences the express desire of the parties to have a guaranteed minimum hourly rate not related to the fluctuating *volume* of their production. This contract clause *operated every pay day* as is apparent from the amount of excess labor which the company has paid. Can the Court disregard the clear intention of the parties merely because on each pay day only some of the employees needed its benefit?

We submit that the frequency of the application of this clause *to individual workers* cannot change the expressed intention of the parties. The fact that the clause specifies a rate which is not fictitious and which has a direct relationship to wages paid conclusively appears from the fact that *it operated as to some employees on every pay day.*

In the case of *Walling vs. Belo Corp.*, 316 U.S. 624, this court gave great weight to the desire of the employees

to have the benefit of the guaranteed weekly salary. So here the parties have annually for five years intentionally renewed the contract to have the definite assurance that every incentive worker shall have certainty in the amount of his hourly compensation. Although this contract does not provide a guaranteed weekly salary, it does guarantee a definite hourly rate to employees whose possible earnings may fluctuate widely.

It was pointed out in *Walling vs. Belo Corp,* 316 U.S. 624, that a rate determined by the method contended for by the Administrator was irregular in the mathematical sense. It could not be calculated until after the work week has been completed. With Harnischfeger Corporation, piece work jobs frequently extend through more than one pay period (one-half month), and a mathematical rate could not be calculated in each pay period. An incentive employee of Harnischfeger Corporation has to wait until the completion of the particular piece work job to ascertain whether he has any incentive earnings thereon. (R. 52, 53).

The employer and employees have been accustomed for many years to think and to speak for their base rates as the regular rates at which the employee is employed and explicity so stated in their employment contract. It is not capricious, nor does it provide for fictitious or unreal rates which have no relation to the wages paid. Rather is expresses the intent of the parties, arrived at after collective bargaining in good faith. In the light of all the facts, it is manifest that this provision of the employment contract is reasonable and proper and should be upheld.

The decision of the Circuit Court of Appeals for the Seventh Circuit is not only consistent with, but follows,

the decision of this Court in *Walling vs. Belo Corp.*, 316 U.S. 624, wherefore the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 956

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Petitioner,

vs.

HARNISCHFEGER CORPORATION,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 68) is reported in 54 F. Supp. 326. The opinions of the Circuit Court of Appeals (R. 81-87) are reported in 145 Fed. (2d) 589.

QUESTION PRESENTED

The collective bargaining agreements between the Company and Local No. 1114, United Steelworkers of America (C.I.O.) which have been in force since Octo-

ber 24, 1938 by annual renewals for five years, provided that the "base rate" is the "regular rate" at which each incentive "employee * * * is employed" and that overtime premium of 50 per cent should be paid to "incentive workers on their base rate as heretofore defined." This series of contracts continued the payment of overtime premium which began in 1933 at one and one-half times the base rates (which exceed the statutory minimum) for work exceeding 40 hours per week.

Does continued performance of this contract under the facts in this case constitute a violation of Section 7 of the Fair Labor Standards Act? Section 16 of the Act makes such violation a criminal offense.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C., sec. 201) are as follows:

> "Sec. 7 (a) No employer shall * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *
>
> (3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
>
> * * * * *
>
> "Sec. 15 (a) * * * it shall be unlawful for any person—
>
> (1) to * * * sell in commerce * * * any goods in the production of which any employee was employed in violation of section * * * 7 * * *

"Sec. 16 (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection."

STATEMENT OF FACTS

The evidence is undisputed. It consists of a stipulation of certain facts (R. 7-20) and the testimony of Herman Menck, Vice President of the Company, called as a witness by Petitioner. (R. 23-58) The statement of facts in Petitioner's brief is incomplete and argumentative. Respondent therefore makes a full statement of the pertinent facts herein.

The Company's production employees are classified into two groups, one called "incentive workers" or "piece-workers" and the other called "non-incentive workers" or "day workers." Approximately 1250 or 50% of the production workers are incentive workers. (R. 71) They are the only employees affected by this case.

The present incentive system has been used by the Company since 1927. (R. 7) Under that system, jobs to be performed by incentive workers are given a "job price" determined by an established formula, one factor of which is the estimated time required to do the job as determined either by a "time study" or by experience on comparable jobs. (R. 25, 53, 71-72)

When the worker is employed, whether he is to work as an incentive worker or as a day worker, he is hired (employed) at a definite hourly rate. (R. 27) In the case of non-incentive workers this hourly rate is called

the "day rate." In the case of incentive workers it generally is called the "base rate." However, in factory parlance the terms "day rate" and "base rate" mean the same thing. (R. 36) The various base rates at which the workers are employed are the hiring rates for the various job classifications then current in the Milwaukee district for the experience of the particular employee (R. 27) and (including the "defense wage adjustment" of 5c per hour) range from 55c to $1.05 per hour. (R. 8, 9)

When a specific job is assigned to an incentive worker he receives a card showing the job price (or "piece rate" on the job.) (R. 30) He is paid at his agreed base rate (hourly rate) for the time which he takes to perform the job. If the job price exceeds this figure, he ultimately receives the difference between the two amounts. Such excess of the job price over the hourly earnings, for the sake of uniformity with Petitioner's brief, will be referred to as the "incentive bonus." It is variously called "incentive premium" or "piecework earnings" (R. 30) or "premium earnings." (R. 36, 45)

When the job price is smaller than the hourly earnings for the time worked on the job, the employee nevertheless is paid at his hourly rate for the time worked. This difference in the wages paid between these earnings at base rates and the job price is called "excess labor", which now averages $5,600 per month or $67,200 per annum. (R. 44)

The worker is paid the hourly rate at which he is hired, for the hours worked, regardless of the efficiency or speed at which he works. The incentive system merely gives him the opportunity to receive more in the instances in which, by his efficiency, the job price exceeds the hourly

earnings. The overtime premium at 50 per cent of the hourly rate is paid in addition to any incentive bonus he may receive.

About 98% of all incentive jobs are "partnership jobs." (R. 42) A partnership job is a single job having a single piece price, performed by groups of two or more inventive workers. Such groups working together may consist of (a) one man on the day shift and one on the night shift working on the same job, or (b) groups of men working together on one job on the same shift, or (c) one group on the day shift working with another group on the night shift on the same job. Only about 2% of the incentive jobs are done by single employees working alone. (R. 42)

On partnership jobs the incentive bonus of the entire group is likewise determined by substracting from the job price the aggregate hourly earnings at the respective hourly rates (base rates) of the men in the group and for the varying number of hours which each one worked on the particular partnership job. The excess, if any, of the job price over this aggregate of the hourly earnings is the total incentive bonus of the group. This incentive bonus is then distributed among the individual workers in the "partnership" in the ratio of their individual base rate earnings for the hours they worked on the job to the total base rate earnings of all the men on the job. This is explained in the Record at pages 42-43 and by Example 2 on Exhibit A. (R. 56, 66 at 67)

The work on many piecework jobs extends into more than one pay period (one-half month). As an illustration, the Company has jobs on which the piece price is over $1,000. Such jobs extend over a period of a month or even two months before completion. Other

piecework jobs which may be finished in only one day or a few days, often extend into two pay periods when begun less than that time before the end of a pay period. (R. 44-45)

On any job which extends into more than one pay period the Company cannot determine with any degree of accuracy what proportion of the piecework price (the job) has been completed at the end of a single pay period. (R. 45) The Company cannot determine whether there will be any incentive bonus on the job until it is completed. (R. 45) Hence, at the end of each pay period the workers, pursuant to the contract, are paid at their base or hourly rates for the hours worked during that pay period, with overtime premium of 50% of these hourly rates. At the end of the last pay period in which the job is completed, the job price is checked against the hourly earnings previously paid (exclusive of overtime premium) to determine whether there is any incentive bonus due on the job, and if so, it is paid on the next pay day. (R. 44-45)

Individual workers are not only hired at the hourly rate, but they constantly request increases in their individual rates. Individual employees are constantly being upgraded upon merit. Approximately 300 such increases in the hourly rates have been granted in each pay period. (R. 48, 49)

There is no uniformity among any of the employees either as to whether he receive any incentive bonus in a particular pay period or as to the amount of incentive bonus received in a particular pay period. As stated above with respect to "excess labor", every employee may during an entire pay period (one-half month) produce less work at piecework prices than his earnings at his

hourly rate for such pay period. In such cases he is pai his hourly rate (base rate).

There is no customary percentage of such incentive bonus. In some pay periods it has averaged for the entire plant as low as 5% above the hourly earnings and in others as high as 29%. Referring to such variation, Mr. Menck testified "She can go all over the lot." (R. 57) Sometimes even "the best men in our place * * * don't earn a cent" of incentive bonus. (R. 36)

Although the stipulation of facts states that incentive payroll figures for May, 1943 may be taken to be representative (R. 8), i.e. as including hourly earnings, incentive bonus and overtime premium, the evidence later introduced without objection established that May, 1943 was "an exceptionally good month" during which the Company's shipments were the highest in its history (R. 46), and petitioner's counsel established they were not representative as to ratio between base rates and incentive bonus. (R. 57)

These facts were stated as follows by Circuit Judge Evans in the majority opinion of the Circuit Court of Appeals:

> "An interesting chart has been submitted, which shows the amount of incentive pay which the incentive wage earners have received because of their ability to turn out work faster than the estimated time fixed for the doing of the task. This chart shows the incentive pay varies from 2c to 29c an hour over the basic wage schedule. The amount of the incentive pay of any employee is dependent solely upon his skill and industry. The compensation of an incentive worker may be no more than base rate pay—and but for the contract, might be even less." (R. 82—The chart referred to is at R. 8, 9)

Using averages derived from payrolls, approximately 98½% of all incentive workers on every payroll receive some incentive bonus. The remaining 1½% of the incentive workers receive only their hourly pay.

Section 3(e) of the collective bargaining contract provides:

> "* * * for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed, is the base rate of each such employee * * *." (R. 11)

Section 4 (a) of the contract provides:

> "The company will operate all shop departments on a basic eight (8) hour day and forty (40) hour week, with time and one-half, computed for incentive workers on their base rate as heretofore defined in Section 3, paragraph (e) * * *." (R. 11)

Pursuant to these contract provisions, the Company paid incentive workers one and one-half times the individual worker's hourly or base rate for hours worked above 40 hours per week in addition to any incentive bonus they might receive. The practice of paying such "time and one-half" for hours worked in excess of 40 hours per week has been continuous since 1933. (R. 41)

The trial court in its Findings of Fact stated:

> "There are a great number of jobs which have not been time studied by the company." (R. 72)

The only witness in the case (called by petitioner) explicitly denied this to be the fact. (R. 53-54) In a speech on March 16, 1942,—three months after Pearl Harbor—he said there were then a great number in the shop. However, as to the situation in general he expressly testified: "It is not a substantial number * * * it is a small number of jobs." (R. 54) This matter is covered in extenso at pages 30-32 of this brief.

The individual base rates of every worker exceeds the minimum hourly rates specified by the statute. (R. 8, 82)

The District Court decided that the Company violated the Act by performing the contract and paying overtime of 50% only on the employees' hourly rates (base rates). The Circuit Court of Appeals reversed this decision. (R. 84-85)

The Court of Appeals held:

> "There would seem to be good reason for providing as the parties agreed, that the regular rate should be the hourly rate (ranging from 58c to $1.08 an hour) rather than said hourly rate plus an unknown and undeterminable addition as incentive compensation. The incentive compensation varied. It was not known. It varied not only in different months but was different with different employees and different products. The addition due to incentive pay was as low as 2c and as high as 29c per hour. The employer and employee evidently wished to provide that overtime payments be paid promptly and at the same time as the payment of the regular wages. They therefore defined regular wage and left therefrom the incentive wage, the determination of which was unknown and unfixed sometimes for weeks and even months.
>
> "There is only one question before us: What was the regular rate of pay? The employer and employees have, as they had a right to do, answered that question for us. They have incorporated their agreement in writing. They acted in good faith. They agreed upon the regular rate of pay, and their regular rate respected the minimum requirement provisions fixed in the statute." (R. 85, 86)

Judge Minton dissented.

ARGUMENT

The "Statement" in Petitioner's brief omits entirely certain facts as to an inherent part of the incentive system under consideration. Petitioner's argument entirely ignores these facts although the conclusion of the Circuit Court of Appeals is based in part upon these omitted facts. (R. 85, 86)

As we read Petitioner's brief, there is no disagreement between us as to the fundamental principle of law involved in this case. We are agreed that even though parties to an employment contract deal at arm's length and in good faith, they cannot enter into a contract, the object of which is to negate the statutory purposes. We readily concede that the parties cannot by contract, establish as the "regular rate" under the statute, a rate which is fictitious and unreal, or which bears no relation to actual wages paid.

A contract which provides for a "fictitious regular rate" or which *arbitrarily* designates a part of the actual earnings as the "regular rate," or one which fixes or computes the "regular rate in a wholly unrealistic and artificial manner," is not effective "to negate the statutory purposes." (*Walling vs. Helmerich & Payne*, 323 U.S. 37, 41, 42)

On the other hand, Petitioner's counsel recognize that the doctrine of *Walling vs. Belo Corp.*, 316 U.S. 624, is that "the employer and employes may establish the regular rate by contract." It must also be conceded in this case as held there that "the contracts were 'actual bona fide contracts of employment' and that 'they were intended to, and did, really fix the regular rates at which each employee was employed.'" (121 F. 2nd 207, 316 U.S. at 629, 630)

The Circuit Court of Appeals, as shown by Judge Evans' opinion (R. 84), applied the philosophy of this court in the Belo case expressed by Justice Byrnes as follows:

> "The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably, Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours. *Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected.* This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day. Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance. Congress has said nothing to prevent this desirable objective. This Court should not." (316 U.S. at 634, 635) (Italics supplied)

In this case as in the Belo case, the contract arrangement has proven mutually satisfactory to the employer and the employes and has been renewed each year since it was first made shortly after the passage of the Act. The employes are not the complainants.

As held by the Circuit Court of Appeals, there is good reason here for the agreement of the parties that the regular rate should be the hourly rate. This was expressed by Judge Evans as follows:

> "There would seem to be good reason for providing as the parties agreed, that the regular rate should be the hourly rate (ranging from 58c to $1.08 an hour) rather than said hourly rate plus an unknown and underminable addition as incentive compensation. The incentive compensation varied. It was not known. It varied not only in different months but was different with different employees and different products. The addition due to incentive pay was as low as 2c and as high as 29c per hour. The employer and employee evidently wished to provide that overtime payments be paid promptly and at the same time as the payment of the regular wages. They therefore defined regular wage and left therefrom the incentive wage, the determination of which was unknown and unfixed sometimes for weeks and even months." (R. 85, 86)

The administrator here, as in the Belo case, requests the court to ignore the special facts and circumstances of this case under which the parties entered into this contract, and to provide a rigid definition of "regular rate" to mean the rates arrived at by dividing the amount of compensation paid on a *semi-monthly* payroll by the number of hours worked, even though, as stated by Judge Evans, the incentive bonus *if any, for* work in a given week "was unknown and unfixed sometimes for weeks and even months." (R. 86)

In urging this, counsel overlook the fact that Congress used a qualifying word in the statute. It did not merely say "rate" at which he is employed. It qualified that "rate" by the word "regular." Congress thereby recognized that the employment contract or arrangement may

provide for payment of some type of compensation which is separate and distinct from the "regular rate." This is in line with the thought expressed in the Belo case that a rigid definition should not be made because employment relationships "were so various and unpredictable."

Petitioner's request for a rigid definition likewise is contrary to the doctrine expressed in the majority opinion by Mr. Justice Murphy in *Tennessee C.I.&R.Co. vs. Muscoda Local 123,* 321 U.S. 590, at 603, where the court said:

> "This does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible. Nor are we concerned here with the effect that custom and contract may have in borderline cases where the other facts give rise to serious doubt to to whether certain activity or non-activity constitutes work or employment."

That case involved the question of whether "travel time" in iron ore mines was part of the working hours of the work week.

"REGULAR RATE" IS NOT A RIGID TERM

Petitioner has recently recognized in a policy statement (Release A-13, dated February 5, 1945—2 CCH Labor Law Service Para. 33074—printed in the appendix attached) that "regular rate" does not under all circumstances include all compensation paid *even though due under the contract of employment.* Petitioner there stated that while the "many variations and refinements" of bonuses payable under promise, agreement or arrangement "will be considered a part of the regular rate * * * and must be included in computing his regular hourly

rate of pay and overtime compensation", bonuses payable "at greater intervals than quarterly", need not be included in the computation of the "regular" pay for overtime purposes "even though the bonus would otherwise be of a type requiring such inclusion"' (except where there is obvious attempt to evade the overtime requirements).

In this release the Petitioner stated:

> "The degree of frequency with which a bonus is paid is a factor which the Divisions have always considered in determining whether it should be included in the 'regular' or 'basic' rates of pay for overtime purposes."

The Petitioner stated further that this release was motivated by—

> "* * * Such considerations as the *recognized bookkeeping difficulty confronting employers* in allocating a bonus paid less often than once each quarter to the hours in which the bonus was earned * * * *and the benefit to employees of having a current knowledge* of the hourly rate upon which their overtime will be calculated * * * ." (Italics supplied)

This release is a practical application by Petitioner of the doctrine expressed in the Belo and Tennessee cases that neither the court nor the administrator should provide "a rigid definition of 'regular rate'" since Congress failed to provide one.

As further explained in *Tennessee C.I.&R.Co. vs. Muscoda Local 123,* supra, at p. 603 the Act "does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible". This doctrine is equally applicable here to permit the reasonable provisions of a contract continuing the agreed,

customary and reasonable method of computing overtime premium where precisely accurate computation is either difficult or impossible and which remains unknown and unfixed "sometimes for weeks and even months."

RIGID DEFINITION IMPRACTICAL IN THIS CASE

The wages in this case are paid semi-monthly. On jobs begun in one pay period and ended in another (one or more pay periods later), the incentive bonus earned in any pay period is not determined until after the end of the last pay period in which any of the work is done. The practical difficulty or, in fact, impossibility of accurately determining how much of this incentive bonus was earned in each pay period is immediately apparent. There is no way in which the efficiency and diligency of each of the workers during each of the pay periods can be determined.

Under the system used here each pay day, the incentive workers are paid their wages at their hourly rates, with overtime premium, plus such incentive bonus, if any, as has been earned on jobs begun and finished in that pay period as well as on jobs begun in earlier pay periods but finished in that pay period.

It is therefore impossible accurately to allocate the incentive bonus to the respective pay periods in which earned. *A fortiori,* it is difficult, if not impossible to allocate the incentive bonus to the proper "work week" as the Act requires, because each pay period is one-half month. This means that in every month of the year, the first pay period covers 15 days (1st to 15th inclusive) and the last pay period covers from 13 to 16 days (16th to the last day of the month).

Plaintiff's Exhibit 13 offered by the Petitioner (R. 26, 60) recognizes the difficulty of accurately determining what Petitioner now contends should be the regular rate on which overtime should be computed. This chart is a summary of figures on plaintiff's Exhibits 1 to 12, inclusive, showing for the employes named thereon, their various base rates, total number of hours worked per week, the hourly earnings at base rate, the incentive bonus earned in the several pay periods and the overtime premium paid on the contract basis. Although petitioner had all the facts he could compute only the *"approximate* overtime earned, plaintiff's contention" (last column of Exhibit 13, R. 60).

This claimed statutory overtime apparently had to be "approximate" because overtime hours under the Act must be determined on a weekly basis, whereas all earning figures under the system used are on the basis of semi-monthly pay periods. This figure is approximate in another respect. As pointed out above, it fails to determine what part of the incentive bonus was earned in (a) any specific pay period or (b) in any statutory work week within such pay period. Manifestly, Congress never intended any such approximate process of wage computation to override the employment contract involved here.

All of these difficulties disappear under the contract plan because overtime premium is paid each day for all overtime worked at 50% of the agreed regular rate.

These facts, of course, entered into the conclusion of the Circuit Court of Appeals that "the employer and employee evidently wish to provide that overtime payments be paid promptly and at the same time as the payment of the regular wages" rather than to have the regular rate include "the incentive wage, the determina-

tion of which was unknown and unfixed sometimes for weeks and even months." (R. 86)

While we earnestly contend that under the doctrine of the B lo and the Tennessee cases the intent of the parties as stated in the contracts should be given effect, this case is at least one within the category described by the following language of Mr. Justice Murphy in the Tennessee case just cited:

> "Nor are we concerned here with the effect that custom and contract may have in borderline cases where the other facts give rise to serious doubt as to whether certain activity or non-activity constitutes work or employment." (321 U.S. at 603)

To paraphrase the above, the most petitioner can claim about this case is that possibly it is a "borderline case where the other facts give rise to serious doubts" as to whether this incentive bonus constitutes a part of the "regular rate". In such a case, certainly the doubt should be resolved in favor of the long established custom and the intent expressely agreed to in this series of contracts entered into as stated by Judge Evans with "the utmost good faith." (R. 85)

In the light of the special facts in this case, the opinion by Judge Evans stated:

> "If the wage agreement in this case did not settle the regular rate in a bona fide manner through negotiation and did not respect the statutory minimum provisions, we are at loss to know how the parties may cover the subject by agreement.
>
> "Also present is the query—if the parties by inserting a definition of a 'regular rate' in their wage agreement did not intend to fix said 'regular rate' as a basis for the time and a half computation, what was their purpose in inserting it at all?" (R. 85)

CONTRACT WAS EXECUTED IN UTMOST GOOD FAITH

In the lower courts, Petitioner's counsel conceded the good faith of the parties in executing this agreement. The majority opinion of the Circuit Court of Appeals states that this wage agreement was made "in a bona fide manner through negotiation," and said "also there was present the utmost good faith." (R. 85) In their brief in this court, counsel say they do not contend that this provision in the agreements was not included "for the purpose of circumventing Section 7" although they argue they know of no other reason for it. (Brief page 18).

This case, therefore, presents the same problem of interpretation to ascertain the true intent of the parties as was presented in *Overnight Motor Co. vs. Missel,* 316 U.S. 572 and *Walling vs. Belo Corp.* In Missel's case, Mr. Justice Reed said at page 579:

> " * * * we are concerned at this point only with the method of finding the regular rate under the contract with respondent."

Since the contract specified only a weekly salary with variable hours of work, this court held that the regular hourly rate was to be determined by dividing the weekly salary by the variable hours of work each week. However, Mr. Justice Reed stated further at page 581:

> "This contract differs from the one in Walling v. Belo Corp., post, p. 624, where the contract *specified an hourly rate and not less than time and a half for overtime,* with a guaranty of a fixed weekly sum, and required the employer to pay more than the weekly guaranty where the hours worked at the contract rate exceeded that sum." (Italics supplied)

In the Belo case Mr. Justice Reed dissented on the issue as to what the parties had intended to be the regular rate but at pages 636-637 he said:

> "The Court's interpretation that, *in the absence of bad faith,* any form of contract which assures the payment of the minimum wage and the required overtime complies with the Act may be assumed to be correct." (Italics supplied)

The principle of these cases that a written agreement which fixes the "regular rate" is controlling if it is made in good faith and if it actually is a regular rate which is not artificial or wholly unrealistic so as to negate the statutory purpose, was again affirmed by this court in *Walling vs. Helmerich & Payne,* wherein it was stated at p. 41 by Mr. Justice Murphy:

> "The Act clearly contemplates the setting of the regular rate *in a bona fide manner through wage negotiation* between employer and employee, provided that the statutory minimum is respected." (Italics supplied)

No claim was ever made by respondent that the Act does not apply to incentive workers. (*U.S. vs. Rosenwasser,* 323 U.S. 360)

Obviously the first problem is to ascertain the intention of the parties to this contract. Since good faith exists, the best evidence of what the parties considered to be the "regular rate" is their written contract from which the intention to fix the base rate as "the regular rate of pay at which the employee * * * is employed" conclusively appears. (Contract Section 3(e), R. 11)

In the Belo case the contract of employment specified an hourly rate and a guaranteed weekly rate. The Administrator's contention was that these two rates were "inherently inconsistent" and that the intention to fix the

regular hourly rate at 67 cents is overridden by the intention to guarantee the $40 per week." This court rejected that contention.

In this case, the Harnischfeger incentive workers receive their base rates of pay for all hours worked and one and one-half times that rate for all overtime hours, regardless of how much work or how little work they turn out. The incentive plan merely gives them the opportunity to earn an extra incentive bonus uncertain in amount and contingent upon his own and his "partners" efficiency. Petitioner now contends that the clear intention to establish the various individual base rates as the regular rate, is inherently inconsistent with the existence of this incentive system. He contends that since a percentage of the time, varying employes earn varying amounts of incentive bonus, the base rate is "artificial" or, within the doctrine of the case of Helmerich and Payne, is a "fictitious regular rate" or a rate computed "in a wholly unrealistic and artificial manner."

While Petitioner's counsel say they do not contend the contract was made "for the purpose of circumventing Section 7", they state "we know no other reason for labeling them as the 'regular rate for all purposes.'" (Brief page 18) Had counsel fully understood the facts in this case, including the numerous important facts which they omitted from their statement of the case, and ignored in their argument, they would have found the "good reason" for this provision so well stated by Judge Evans. (R. 85, 86).

Petitioner's counsel suggest that because this method of overtime compensation has been employed since 1933, that fact may explain the alleged "failure of the contract to satisfy the overtime requirements of the Act." (Note

on brief page 18). Counsel overlook the fact that this contract has been in force by five annual renewals "since October 24, 1938," (R. 7) the effective date of the Act. The contract of record is dated December 9, 1942. (R. 7) By that date the position of the Petitioner as to the method of computing the regular rate under incentive systems *in the absence of a valid contract to the contrary* was well-known. (See Interpretative Bulletin No. 4, issued November 1938 and revised November 1940.) The Belo case was decided June 8, 1942. This contract therefore was made with full knowledge of the Administrator's position and that decision of this court.

We respectfully submit that the facts in this case demonstrate these contentions of petitioner to be unsound.

THE HOURLY RATE (BASE RATE) IS NOT ARTIFICIAL OR FICTITIOUS

Under the long established practice of the parties continued by this contract, the base rate is actually used on every payroll for computing wages paid.

It is the only certain basis upon which any of the incentive workers can be paid and is the only basis upon which some are ever paid. It certainly is a rate which bears a real relation to actual wages paid.

THE STATUTE REFERS TO THE REGULAR RATE "AT WHICH HE IS EMPLOYED"

Petitioner's counsel present their entire case as if the statute uses the words regular rate *of pay* or regular rate at which he is *paid* rather than regular rate *"at which he is employed."* The fact that Congress used the term rate "at which he is employed" thereby denot-

ing the contract of employment is significant. Petitioner's counsel concede that Section 7(a)

> "* * * contemplates that employes and employers will agree upon the employes' normal compensation by individual or collective negotiations. Provided that the minimum hourly rates established under Section 6 are paid, they are likewise free to fix, and alter as they wish, the method of compensation and the rate at which the employes will be employed during the regular 40-hour work week." (Petitioner's brief, page 15 in *Walling vs. Youngerman—Reynolds Hardwood Company*, No. 955 of this term, which is referred to in the brief in this case)

The opinion by Mr. Justice Jackson in *J. I. Case Company vs. National Labor Relations Board*, 321 U.S. 332, points out that a collective bargaining agreement between the employer and the Union is not the entire contract of employment except in rare cases; that it may be called "a trade agreement rather than * * * a contract of employment" by which "the terms of employment already have been traded out" so that "there is little left to individual agreement except the act of hiring" which may be by writing or by word of mouth or implied from conduct. (321 U.S. 332, at 335) That situation applies to this case.

The collective bargaining agreement here established most of the terms of employment. The actual hiring was accomplished by word of mouth. When the employe is hired at a definite base rate, that is the rate "at which he is employed." It is the hiring rate which is current in the area. (R. 8, 9, 27) It is the rate which he is to receive *all the time* (regularly), without regard to how much or how little he produces. If he is an incentive worker, it is the rate which is used to deter-

mine how incentive bonus, if any, on partnership jobs is to be divided and 98% of all incentive jobs are partnership jobs. (R. 42) It is the only rate which under the system can be paid in full for all hours worked, promptly on each pay day, with the overtime premium paid promptly and at the same time as the payment of the regular wages. (R. 86—Opinion below)

Wages, of course, must be paid every pay day. That is a term of the employment contract implied by custom. It is clear that the employer and the employes, as stated by Judge Evans "wished to provide that overtime payments be paid promptly and at the same time as the payment of the regular wages * * * and left therefrom the incentive wage, the determination of which was unknown and unfixed sometimes for weeks and even months." (R. 86)

THE ACT WAS A PEACETIME STATUTE

The Act in question was approved by the President June 25, 1938. This was still the period of depression. In normal times the Company attempted to hold down overtime hours and required special permission to have men work overtime hours. (R. 46)

Although merchandise produced during overtime hours necessarily has a higher labor cost, this Company made no attempt to keep track of which merchandise was made on overtime hours. (R. 41) This expense was charged to overhead. (R. 46) In normal peacetime operations, overtime work is the exception rather than the rule. This provision first appeared in the contract when overtime was the exception. Overtime has grown enormously during the war. It will be largely reduced when peacetime operations are resumed. The

Act was passed in peacetime and this contract provision was first made in peacetime. *Both are intended primarily to regulate conditions during peacetime.*

In the long run and particularly in peacetime, continuance of high base rates and of satisfactory piecework prices is infinitely more important to the Union and the employes it represents, than a change in the long established method of computing overtime premium because of the war.

It is obvious that if upon Petitioner's theory the method of computing overtime premium is changed, the resulting increased costs would cause pressure upon the Company to bargain collectively for some corresponding reduction in either base rates or piecework prices to offset this increase in labor costs, which is *entirely unintended so far as the contracting parties are concerned.* There is no evidence that either the Union or the employes desire any such change or the resulting pressure on the entire wage structure by reason thereof.

THE PERCENTAGE ARGUMENT IS NOT SOUND

Petitioner's counsel rely largely upon the fact that 98½% of the incentive workers earn some amount of incentive pay, and contend that *ipso facto,* the "regular rate" fixed by contract, is a mere artificial label.

Petitioner's counsel also use 22% or 28% as the so-called average percentage of incentive bonus. Although the figure of 22% appears in Finding VIII (R. 72), as noted above, this statement is based upon figures in the stipulation which as shown by the record, was to be taken as representative only for a limited purpose. As brought

out by Mr. Harding, trial counsel for Petitioner, there is no customary percentage of incentive bonus which fluctuates from a low of 5% to a high in May 1943, the best month in the Company's history, of 29%. (R. 57)

The most that can be said on this point is that based upon averages, approximately 98½% of all incentive workers receive *some* incentive bonus which varies as to the individual worker "all over the lot." (R. 57) On the basis of plant averages, it may average as low as 5% and in May, 1943, the month of highest shipment in history, it went as high as 29%. (R. 57)

The question is therefore correctly stated in this way: Does the fact that under these facts and circumstances 98% of the incentive employes on the average receive some incentive bonus in addition to their earnings at hourly rate, require the conclusion that this contract violates Section 7 by attempting to establish a regular rate which is actually artificial or fictitious, or unreal and bearing no relation to wages actually paid so to to negate the statutory purposes?

We respectfully submit that this conclusion should not and does not follow.

One of the oldest and most common fallacies in logic is that identified by the phrase *"Post hoc ergo propter hoc."* This fallacy is inherent in the argument of plaintiff's cousel who assert that because an employe received $X.00 at the end of a *pay period*, the regular rate at which he was employed in a *work week* must be $X.00 divided by the hours worked in the pay period and then applied, *by estimate or otherwise*, to the particular work weeks within this pay period.

This reasoning is fallacious and contrary to the express agreement and the actual practice. By this over-

simplified approach, counsel ignore the true doctrine of the Belo case and of those cases which have followed it.

The facts here demonstrate that, as intended by the parties and as held by the Circuit Court of Appeals, the incentive bonus is received under special circumstances as something separate and apart from the "regular rate at which he is employed".

Of great importance is—what was the intention of the parties and what did they consider the controlling factor?

There was no showing in the Belo case as to how often employees worked more than 54½ hours and received more than the weekly guarantee. So here, the *number* of incentive employes who receive only the base rate each pay day is not controlling. It is a mere matter of degree. Can the court hold that the clause is arbitrary, or unreal only on the basis of the number who receive monetary benefits from it each pay day? In determining the intention of the parties to a contract renewed over five years, is one to say that because only 1½% of the employes on each pay day receive pay *entirely* under this clause, that the parties did not intend the clear meaning of their words? If so, at what stage in the percentage column will a change take place?

This contract among other things expresses the desire of the employer and the employes to have a definite rate of pay for each employe, not related to his individual or "partnership" volume of production.

Without regard to how many individual employes would have earned less than their base rates but for this contract, the fact is clear that this clause fixing the base rate as the regular rate *operated every pay day*. This is established by the amount of "excess labor" paid

each month and by the constant use of this rate in computing the amount of incentive bonus on the "partnership" jobs.

This court is therefore faced with exactly the same type of interpretation of a contract as was presented in the Belo case,—a choice between an agreed hourly rate as the regular rate and a varying so-called regular rate, to be determined weekly resulting because of a of a contingent and varying semi-monthly incentive bonus. We submit, to paraphrase language in the Belo case that "In this situation, then, it is clearly the *incentive earnings* (guarantee) that become *uncontrolling* (inoperative) and the *base rate* (67 cent hourly rate) fixed by the contract that is controlling." (The added words are in italics. The words from the Belo opinion at page 632, are in parenthesis.)

A rate determined by Petitioner's proposed method would be extremely irregular in the mathematical sense. These parties have been accustomed for years to think and to speak of the base rates as the "regular rate". In the light of the facts in this case, we submit that this provision of the contract is not a sham, is not an artificial label, nor does it provide for fictitious or unreal rates which have no relation to the wages paid.

This conclusion appears clearly from the facts. But even if it be a "borderline" case as suggested in the *Tennessee Coal & Iron case,* the court should hesitate very much to upset a plan which has proven mutually satisfactory year after year and which does not negate the statutory purposes, but instead fulfills the twofold purposes of the Act—(1) to spread employment by placing financial pressure through requiring the payment of overtime premium, and (2) to compensate employes

for the burden of a work week in excess of the hours fixed by the Act.

COLLATERAL ARGUMENTS

While the intention of the parties to fix the base rate as the regular rate appears very clearly from Section 3(e) of the contract (R. 71) and from the other facts herein referred to, there are two other provisions of the contract which are consistent only with this intent.

Section 7 provides that if an employe has been unjustly discharged he shall be reinstated and the company shall "pay full compensation at the employe's regular base rate for the time lost." (R. 17) Thus the parties have expressly agreed that payment at the hourly rate for time lost constitutes "full compensation" to the employe.

Section 4(f) provides that the company must supply each employe with a minimum of four hours' work or four hours' "day rate pay shall be paid, to employees reporting for work unless such employees are notified not to report during the previous day." (R. 14) The terms "day rate" and "base rate" are synonymous. (R. 36) Thus the contract again recognizes that the equivalent of the failure to supply four hours of work under this circumstance is to pay him for four hours *at his hourly rate.*

Petitioner's brief refers to the following sections of the contract which relate to exceptional situations which either arise very seldom or not at all:

1) Section 3(g) (R. 12) provides that "in the interest of maintaining fair piecework rates and encouraging employes to disclose erroneous piecework rates" the com-

pany will not cut or question any established rate "even though the employe is able to turn in as much as twenty (20%) per cent over the standard earning rate. The company, however, reserves the right to question rates where earnings exceed twenty (20%) per cent over standard earning rates." (R. 12) Counsel argue that this makes it plain that employes "are expected to earn substantially more at piece rates than their base rates." (Brief p. 13) This contention was categorically denied by Mr. Menck as follows:

"Q. In other words, a man is expected to make more than his base rate on those jobs?

A. That is not correctly putting it. We don't expect any man to make any piece-work; that is up to him if he wants to. We like to see him make it. Now, if a fellow that is in the habit of earning some piece-work, is a good worker and applies himself, and we ask him to do a day work job, it is only fair that we pay him something over his base rate because we took the ability away from him to earn for two or three hours piece-work jobs because we ask him to do a day work operation.

Q. Well, would it be correct to say that he could be expected to make 20 per cent over his base rate on other jobs?

A. No.

Q. Therefore, you agree to pay him 20 per cent over on a job that is not time studied?

A. No, I can show you the best men in our place that sometimes they don't earn a cent. They are not expected to earn any percentage." (R. 36)

2) Section 3(h) of the contract provides that on any job that should normally be done on piecework where a job price has not been established and cannot be estimated, the job shall be done on day work and the piece-

worker given a premium of not less than twenty (20%) per cent over his hourly base rate. (R. 12). Counsel argue that there are a "great number" of such jobs (Brief, pages 5, 12) and that on such jobs an incentive worker may be paid at least twenty (20%) per cent higher than his base rate "hour after hour and week after week" (Petitioner's Brief, page 19). This is an incorrect statement in two respects:

a) There are only "a small number of (such) jobs" (R. 53, 54), and

b) The pieceworkers are assigned to such jobs only "for two or three hours" at a time. (R. 36)

Petitioner's counsel base their statement on the finding of the trial court that "There are a great number of jobs which have not been time studied by the company." (R. 72, fdg. VII) The record shows that through inadvertence the trial court was inaccurate in this statement. (R. 53-54)

On March 16, 1942, approximately three months after Pearl Harbor, Mr. Menck, Vice-President of the Company, called as a witness by petitioner, made a speech to the employes for the purpose of increasing war production, (Ex. 14, R. 61) following which war production was increased about 10 to 15%. (R. 52) Naturally, due to the new type of orders coming in and pressure for production, the ability to time study the new jobs was restricted. He sought to eliminate any fear on the part of the men that increased production on their jobs would later be used against them and he stated:

> "I also know that there are a great number of jobs in the shop which are marked 'T.S.' and have no rate."

"T.S." means a job to be time studied. (R. 53)

It is most unfair that the situation existing on March 16, 1942, three months after Pearl Harbor, which the court will judicially note was a most exceptional period, should be urged as demonstrating that the incentive plan in force since 1927, with overtime premium paid since 1933 for work over 40 hours per week at one and one-half times the regular rate was fictitious or artificial. In fact, the Administrator's trial counsel sought to have the witness agree that his statement meant there were regularly in the respondent's plant a "great number" of jobs which were not time studied. The witness expressly and explicitly denied this. Since he was the only witness, his undisputed testimony must control over the equivocal and, we submit, erroneous statement in the trial court's findings. That testimony (R. 53, 54) is as follows:

"Q. Are there a great many T.S. jobs that are not rated?

A. Not a great many.

Q. How do you explain the statement in Plaintiff's Exhibit 14 where you say, 'I also know that there are a great number of jobs in the shop which are marked T.S. which have no rate'?

A. That is right.

Q. I thought you said that there weren't a great number of those.

A. It depends on what you call 'a great number.' You didn't ask me to establish any percentage here.

Q. Well, can you give us a percentage, then?

A. I would rather not, because I may be very inaccurate.

Q. What statement is correct, the statement you made previously or the statement you made in that exhibit? There you say there are a great number of jobs.

A. This exhibit is a reprint of a part of a speech. I didn't know that this would be part of a court record at some later trial. I merely wanted to indicate to our men that if there is a T.S. job out there and they don't get a rate on it, it happens, for instance, there is no time study man available, they can't study the job, all right, he will not suffer on it because we didn't have the price on it. That is merely what I wanted to indicate.

Q. And you indicated there were a great number of those jobs?

A. I used the word 'great number.' We have 900 jobs out in the shop, let's say a thousand. That is a great number.

Q. Apparently that is a substantial number or you wouldn't have mentioned it to the men?

A. It is not a substantial number. That is not the fact. It is a small number of jobs.

Q. At any rate, there are a certain number of T.S. jobs which are not rated?

A. There are." (R. 53, 54)

Mr. Menck explained that we bargained for not less than twenty (20%) per cent although "the fellows that bargained for the contract probably would like it to be 100%." (R. 35)

There was no testimony at all that an incentive worker could be assigned to such a non-rated job for as much as a week. The testimony on that point was as follows:

(By Mr. Harding, Petitioner's Trial Counsel)

"Q. Are there times when an incentive worker might perform work on a non-time-studied job or jobs over a period longer than a week?

A. Oh, no; none to my knowledge." (R. 32)

3) The same facts apply to Section 3(i), which provides for a premium of not less than twenty (20%) per cent over hourly base rate where a pieceworker is requested to do day work. This situation seldom happens. (R. 47).

4) Section 3(j) (R. 12) provides that when a pieceworker is required to work on a single piece or small order job "under conditions beyond his control which makes it impossible for him to earn his average high earning rate, an adjustment will be made to yield such rate." Mr. Menck testified that this situation has never happened in his own experience with the company (R. 48) which covered a period of 8½ years. (R. 24)

In addition to the fact that each of these clauses refer to situations which happen seldom or not at all, each of these clauses is subject to Section 3(n) R. 13) which provides for cancellation of all of these premiums by the Company for "any wilful misuse or abuse of day work or rates set." Thus, by the contract it was the base rate *which remained constant under all circumstances.*

5) Petitioner's counsel also refer to Section 13 of the contract (R. 18) by which the Company grants vacations with pay at the "average hourly earnings (exclusive of overtime compensation)." Obviously, the rate of vacation pay is a matter of bargaining. It is not payment of wages for work done. If it were, then since it is due by contract, on Petitioner's theory it would also be a factor in determining the regular rate. Obviously, it is but another example of the type of compensation paid to em-

ployes which is extra and separate from the wages paid based on the regular rate.

The fact that the parties saw fit to provide a special premium for these special occasions which occur so infrequently, is consistent with the fact that the base rate is the regular rate at which the employe is employed.

THE ACT IS A CRIMINAL STATUTE

Although this is a suit in equity, if Respondent's payroll system violates Section 7, the Respondent will have committed an "unlawful" Act under Section 15(a), and under Section 16(a) would be guilty of a crime for wilful violations. While this is a remedial statute, nevertheless the well-established principle of strict construction of criminal statutes applies, and if the statutory language is capable of two constructions, that which relieves the person charged should be adopted.

At an early date Chief Justice Marshall said in *United States vs. Wiltberger,* 5 Wheat. 76, at page 95:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."

This proposition was recently reaffirmed and the *Wiltberger* case cited in *Fasulo vs. United States,* 272 U.S. 620, at 628.

Even if the court should consider this a "borderline" case, which we think it is not, we submit that any doubt should be resolved in favor of sustaining the validity of the acts performed.

CONCLUSION

We submit that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Wage and Hour and Public Contract Divisions Release A-13, February 5, 1945.

A summarization of the position of the Wage and Hour and Public Contracts Divisions with regard to the inclusion of 'bonus' payments in computation of 'regular' or 'basic' rates of pay for overtime purposes under the Fair Labor Standards Act and the Walsh-Healey Act was issued today by L. Metcalf Walling, Administrator of the Wage and Hour and Public Contracts Divisions. This statement was prompted, the Administrator said, by numerous inquiries from employees and employers requesting clarification of the principles followed by the Divisions in applying the overtime requirements of these acts to situations where 'bonus' payments are distributed by employers to employees who work overtime.

Mr. Walling's statement follows:

"Under the Fair Labor Standards Act and the Walsh-Healey Act overtime compensation is payable to employees at rates not less than one and one-half times their 'regular' rates as provided in the Fair Labor Standards Act or 'basic' rates as provided in the Walsh-Healey Public Contracts Act. The 'regular' rate of pay has been defined by the United States Supreme Court in recent decisions as 'the hourly rate actually paid for the normal, nonovertime workweek.' The court has also made it clear that no distinction or discrimination based on the method of employee compensation should be made in applying the provisions of the Fair Labor Standards Act. These decisions support, with respect to both acts, the Divisions' views, as announced in releases R-1548

and R-1548(a) dated September 2, 1941. As stated in these releases, where an employee's 'regular' or 'basic' rate of pay is increased by the payment to him of a 'bonus', additional overtime compensation must be paid for those workweeks in the bonus period when overtime was worked, unless provision is made for the inclusion of such overtime compensation in the 'bonus' payment itself by calculating it on a percentage-of-total-earnings basis.

'Releases R-1548 and R-1548(a) define the type of "bonus" which affects the regular rate of pay and describe how such "bonuses" are to be included in computing the regular rate and the overtime compensation due under the Fair Labor Standards Act. The same rules are applied under the Walsh-Healey Public Contracts Act. These releases, which express the official position of the Divisions with respect to bonus payments, state:

'There are two general categories in which bonus plans fall:

A. In bonus plans of the first category, the payment and the amount of the bonus are solely in the discretion of the employer. The sum, if any, is determined by him. The employee has no contract right, express or implied, to any amount. This type of bonus is illustrated by the employer who pays his employees a share of the profits of his business or a lump sum at Christmas time without having previously promised, agreed or arranged to pay such bonus. In such case, the employer determines that a bonus is to be paid and also sets the amount to be paid.

Bonus payments of this type will not be considered a part of the regular rate at which an employee is em-

ployed, and need not be included in computing his regular hourly rate of pay and overtime compensation.

B. In bonus plans of the second category the employer promises, agrees or arranges to pay a bonus. The amount to be paid may be fixed or may be ascertainable by the application of a formula. An example of this type of plan is a production bonus based on the excess over a minimum quota which the individual, the group, or the plant, produces in a period of time. Closely akin is a bonus which is paid for performing work in less than an established standard time and also a bonus which is paid when certain types of merchandise are sold through an employee's efforts. Other kinds of bonuses falling within this group are bonuses distributed in a certain amount or on the basis of a fixed percentage of the profits of the employer or of his gross or net income. There are many variations and refinements of plans within this category. For example, the amount of the payment may vary according to the length of service of the employee, his production or compensation; the earnings, production or compensation of the group of employees with which he works; the sales or net or gross income of the employer; or it may be contingent upon his continuing in the employ of the employer until the time the payment is to be made.

Bonus payments of this type will be considered a part of the regular rate at which an employee is employed, and must be included in computing his regular hourly rate of pay and overtime compensation.'

Many employers have been troubled by retroactive allocations of a "bonus" where it was distributed less frequently than at the regular pay periods. This difficulty can easily be avoided. No additional overtime

compensation need be computed and paid on a bonus, the amount of which is in fact arrived at by taking a predetermined percentage of the total earning of the individual employees (both straight time and overtime), exclusive of the "bonus". Where the amount paid to each employee is actually based on a percentage of his total earnings, the "bonus" itself includes the payment of both straight time and overtime.

The degree of frequency with which a bonus is paid is a factor which the Divisions have always considered in determining whether it should be included in the "regular" or "basic" rates of pay for overtime purposes. As an enforcement policy to be followed in the absence of authoritative rulings by the courts, the Divisions will in the future not insist on the inclusion of any bonus (except where there is obvious evasion of the overtime requirements) which is paid at greater intervals than quarterly in computations of the "regular" or "basic" rate of pay for overtime purposes, even though the bonus would otherwise be of a type requiring such inclusion. Such considerations as the recognized bookeeping difficulty confronting employers in allocating a bonus paid less often than once each quarter to the hours in which the bonus was earned, the time-consuming burden placed upon the inspection staff when confronted with the task of making such allocations and the benefit to employees of having a current knowledge of the hourly rate upon which their overtime will be calculated motivate this administrative policy.

This enforcement policy, of course, does not and cannot affect the independent right of employees under Section 16(b) of the Fair Labor Standards Act to bring their own suits to recover wages that are due them.